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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

HYMAN HARVEY KLEIN, MAURICE HAAS, and MORRIS O. ALPRIN,

Defendants-Appellants.

and

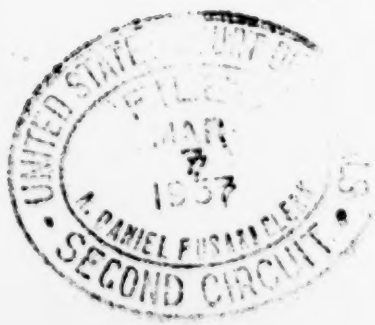
ISIDOR J. KLEIN, ALBERT McLENNAN, GEORGE NORGAN, ELLIS ROSENBERG, IRVING A. KOERNER and ALBERT ROER,

Defendants.

APPENDIX TO APPELLANTS' BRIEFS

Volume II

(Pages 690-1364)



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APPENDIX TO APPELLANTS' BRIEFS

Motion of Defendant Hyman Harvey Klein for Judgment of Acquittal

[5692] New York, June 22, 1955, 9:30 o'clock a. m.

Trial resumed.

(The following proceedings were held in the absence of the jury:)

Mr. Kiendl: If your Honor please, the defendant Hyman Harvey Klein now moves for judgment of acquittal as to him under each and every count of the indictment pursuant to the provisions of Rule 29 of the Criminal Rules. We base our motion on the language of the rule.

The evidence in this case to date is wholly insufficient to sustain a conviction as against Klein on any one of the five counts named in the indictment.

But we do go very much further than that. We contend that a fair analysis of the evidence thus far adduced in this case leads inevitably to the conclusion that the Government has disproved the very allegations of the indictment and the bill of particulars and disproved the guilt and established the innocence of [5693] this defendant on all counts.

* * *

[5747] Now, the fifth count. The fifth count, according to my professional experience, is without doubt one of the most fantastic counts in an indictment that I have ever heard of. It is a hybrid count, [5748] nothing less. It is a count that alleges there was a conspiracy to defraud the Government in the exercise of the Treasury Department's functions in assessing and collecting income taxes by impeding, impairing, obstructing and defeating the collection

of income taxes. It is founded on a strange proposition that that conspiracy went into existence as the result of a filing of income taxes by Roer and Koerner and Alprin in 1950 and 1952.

It is a curious count in that it contains no charge whatever that the 1947 return of H. H. Klein was false.

I want to call your Honor's special attention to the allegation in the bill of particulars in the fourth item that that portion of the Klein 1947 income tax return that is there set forth for the calendar year 1947 which it is alleged in Counts 1 through 4 to be false—apparently, the United States deliberately omitted from that count any allegation as to Count 5.

The count is a strange one in that Mr. Koerner is named as a conspirator but not as a defendant.

[5749] Now, by what process of reasoning the Government or the grand jury reached the conclusion that Mr. Koerner was a conspirator but not a defendant, we don't know. We can't imagine what that process could have been. If Mr. Koerner was not a defendant in the other counts of the indictment it would be understandable. But he is named as a defendant in all the other counts, and here he is named only as a conspirator, but some reason that we would like to be enlightened about when the Government's turn to argue comes.

Mr. Roer, again he is neither named as a conspirator nor as a defendant, although his income tax return filed in 1950 is mentioned in that count of the indictment.

Those things just don't make sense to us. There must be some explanation. I think the Court and counsel for the defendant are entitled to hear it from the prosecution.

The Court: Well, doesn't the United States Attorney or the prosecution attorney, or the grand jury, for that matter, in bringing an indictment have the right just to arbitrarily exclude anyone that could be joined as a defendant? I mean, is there [5750] any law that says if A, B, C and D are alleged to have engaged in a conspiracy, may the United States Attorney not arbitrarily, without explanation, say that A and B are defendants, C is a co-conspirator, and not even designate D as a co-conspirator?

Mr. Kiendl: Certainly, your Honor. The grand jury or the United States Attorney can arbitrarily do that. Our argument is predicated on the contention that it was done arbitrarily and it was done arbitrarily because it was an unusual and strange situation that confronted the United States Attorney, when they realized that they probably would have all sorts of difficulty in obtaining a conviction as to the first three substantive counts and as to the conspiracy count and added this on in the hope that they might get a conviction as to some or all of these defendants on some count in the indictment. Certainly there is no compulsory reason for a grand jury to indict anybody it doesn't want to indict or for the United States Attorney to indict anybody that he doesn't want the grand jury to indict.

But in that connection, we point out again—we point out; we haven't thus far—that two other individuals are named in that indictment, Rokoff and [5751] Silver, and there isn't the suggestion of any evidence to connect them with the conspiracy alleged in that indictment. I can't find in this record nor can my assistants find one syllable to support the contention advanced in that count that Mr. Rokoff and Mr. Silver were conspirators engaged in a conspiracy, engaged in an attempt to defraud the Government by impeding the collection of income taxes during those particular years.

Now one other thing about that fifth count that I should call your attention to. There is no charge, no substantive count there against Alprin or against Roer or against Koerner for filing any false returns. Roer's return was filed 1950, the other two are 1952, and the indictment is silent as to any substantive offenses as against them.

One more thing about the fifth count and I will come to Mr. Green. The proof on the fifth count, so far as I can ascertain, excludes Mr. Klein completely from any participation in what was alleged to have been done pursuant to that conspiracy.

There were three drafts drawn totaling, roughly, $800,000, two to the order of a concern [5752] named Economica, one to a concern by the name of Fernandina, and all three drafts were drawn on the bank account of the Tivoli Corporation.

The very proof that the Government read into the record from the testimony of Mr. Klein proves positively that he had no participation whatever in

the alleged conspiracy, for the proof is that the Tivoli books and records show that those items were put in as commissions and expenses, and the proof is that these seven individuals who were originally given the opportunity to subscribe to the stock of the Tivoli Corporation, that all seven of them signed receipts for the moneys that they had put in in payment for their subscriptions and the subscriptions were all canceled. That is the proof as to Klein. And we submit it is wholly insufficient to sustain that count of the indictment as against him or to raise any question for a jury to pass on.

* * *

MOTION OF DEFENDANT HAAS FOR JUDGMENT OF ACQUITTAL

(Short recess.)

[5766] Mr. Bender: May it please the Court, I trust that what I have to say in this oral argument will not be deemed to in any way constitute a waiver of any objection that I may raise or that I could possibly raise but haven't referred to in my argument. I would like to take advantage of other objections that I will make in my brief when I submit it to your Honor on Thursday. And for example I would like also to include an application based upon motions that were made prior to the trial as well as arguments made by Mr. Kiendl or any of defense counsel. I am merely now directing my oral argument to the factual points with regard to defendant Haas as well as a few legal principles applicable thereto.

I also would like to ask your Honor to afford me the benefit of arguments made by Mr. Kiendl in so far as they are applicable to the main case against the defendant Haas.

As Mr. Kiendl has pointed out, your Honor, and the rules——

The Court: Excuse me, Mr. Bender. Wouldn't it be better for you to make your motion first?

Mr. Bender: Yes.

[5767] The Court: And then go into argument.

Mr. Bender: Yes, your Honor.

The defendant Haas, your Honor, does move for a judgment of acquittal under Rule 29(b) on all counts on the ground that is provided in that rule that the evidence is insufficient to sustain a conviction on any of the offenses set forth in this indictment.

Now it is my understanding that the sole function of the trial court when such a motion is made is to determine whether there exists substantial evidence taken in the light most favorable to the Government which tends to show that the defendant is guilty beyond a reasonable doubt.

Now there are some variations of that test, but I think substantially that is what the cases interpret the test under Rule 29(b) to be: Is there substantial evidence taken in the light most favorable to the Government which proves the defendant Haas' guilty beyond a reasonable doubt?

* * *

[5783] Now the payment of the $35,000 to Compania Commerciale la Ribera, your Honor, some of the bank records which you have admitted subject to connection, I contend have absolutely nothing whatsoever to do with the first three counts. There may be some relevance to the fifth count which I will discuss in a minute. Mr. Haas received, or the corporation received that check in 1947, long before—not long but after the alleged whiskey ventures in this case. There is no evidence in this record that Commerciale or Compania [5784] Commerciale La Ribera was set up in connection with the Harwood Whiskey venture. As a matter of fact, the evidence is to the contrary. The statements of the defendant Haas indicates that this payment was made for the purpose of starting a new venture with this corporation. He says that Mr. Klein after he had sold out all his interests in these other foreign corporations was contemplating starting up a new business not connected whatsoever to the Harwood or the whiskey ventures.

So that as to the evidence in this record, Commerciale la Ribera, as far as this defendant Haas is concerned, had nothing whatever to do with Harwood or other whiskey ventures mentioned in this case.

I would like to point out while I am discussing it, your Honor, even with regard to the fifth count the only evidence in this record as to what that payment made Commerciale la Ribera was—at least in which the Government can attempt to try to draw

some solace from in connection with the fifth count is an entry in the books of Tivoli that it was under the heading of "Accrued commissions and expenses."

But the statement of the defendant Klein, while it is not admitted against the defendant Haas, is never- [5785] theless a statement offered in evidence by the Government just as if it put a witness on the stand, says that it was not for services rendered. It says he believes it was a loan, just as Mr. Haas says in his statement. And obviously if it was a loan and it was not income, you couldn't impair the collection of any revenue on it, because there was no revenue due.

But I will come to that in a minute on the fifth count.

The evidence as far as we can see on the two opinions and on the auditing work of Haas, Schlesinger & Mayers is so insufficient, your Honor, to bring any knowledge on the part of Maurice Haas on the first three counts of this indictment that I can only say to you that if he is guilty on this evidence, so is Mr. Older, so is Mr. Henry Burke, so is Root, Ballantine, and so is McGuigan and Kilcullen.

* * * *

[5792] Now with regard to the fifth count I think I have already alluded to the impact of this evidence with regard to the $35,000 paid to Compania La Ribera. I think it is rather academic, your Honor, if what I say about the evidence in this case is so, that this was a loan to a corporation that had actually not started to do any business then obvi-

ously it couldn't [5793] be income on which the Collector's duties were impeded or impaired or obstructed. I think it is also clear that the payment was made after the Harwood venture had ended. I think it is also clear that it is nowhere charged in the indictment, and I think it is extremely significant that nowhere in this record is there any proof as to what the fact was as to whether or not Mr. Haas did report it when he received it or didn't report it when he received it or that he reported it in 1949. It is true that in his statement he admits that he did not report it until 1949. But where is there any independent evidence to corroborate that admission? And even if it was in, we say, your Honor, it is nowhere charged in the fifth count that as a part of this conspiracy Mr. Haas would receive $35,000 or this company would receive $35,000 that he wouldn't pay income on it until 1949.

The Court: The $35,000 check to La Ribera however was drawn simultaneously, unless I am wrong, with the checks to La Economica and Fernandina, were they not?

Mr. Bender: I don't think so.

The Court: March 27, 1947.

[5794] Mr. Bender: I think it is a month earlier, your Honor.

The Court: I mean substantially about the same time. There was no great lapse of time between the drawing of the $35,000 check, which was characterized in one point or another as a loan to La Ribera on behalf of Haas, and there is no substantial time

lapse between that one way or the other and the drawing of the checks to Koerner which ultimately came to—the proceeds of which ultimately came to Koerner, Alprin and Roer.

Mr. Bender: Well, even assuming that that is so, your Honor, the evidence in this record that the Government has offered does not indicate——

The Court: You say nowhere in the indictment, not in specific language, is it charged that the $35,000 check is in the same category, but I was just turning over in my mind whether under the fifth count it couldn't be a fair inference on the basis that it isn't so remote and on the basis that the Government is not required to set forth every single part of the conspiracy. Now you are addressing yourself only to the fifth count, and so am I.

Mr. Bender: That is correct.

[5795] The Court: And so while it is not specifically set forth in the fifth count as are the Koerner, Alprin and Roer checks, the jury might be permitted to draw inferences from its source and from the proximity of time, even though it is not specifically enunciated in the indictment. Nobody disputes that it is not specifically enunciated in the indictment. But what I am trying to indicate to you is that I don't buy your suggestion that for that reason it is out of the case entirely.

Mr. Bender: No, I have indicated that there is another reason.

The Court: All right.

Mr. Bender: And I am addressing myself now on the motion at least for judgment of acquittal——

The Court: Yes.

Mr. Bender: To the fact that there isn't any evidence in this record to indicate that the $35,000 payment to Compania Commercial La Ribera was for commissions or was for services rendered, but on the contrary it would seem clear that it was a loan, and if it was a loan it could in no way impede the collection of any revenue on it because it wasn't taxable.

[5796] And, as a matter of fact, the statement of Mr. Haas indicates that when it first became income, which it did in 1949 after they released the freeze up there in Canada and he offered it back to Klein—I am only talking about his statement, because there is no evidence in the record about this other than that—he then reported it as a capital gain and so did his other two partners.

But there is no evidence in the record to indicate that that $35,000 had anything to do with any of the Harwood venture or any of the whiskey venture. There is no evidence to indicate that it was for commissions allegedly paid or for services rendered. The evidence is to the contrary. And I can't see how, therefore, the $35,000 payment to Commercial La Ribera in any way can be utilized to make out a case against Haas in the fifth count.

And I want to say at this time, and I will mention it further in my brief, it is for that reason that I intend to move to strike that exhibit from the record, because your Honor took it subject to connection

and the Government, in my opinion, has not connected it in any way, and it is highly prejudicial to even leave it in the record in the state in which [5797] it is now.

The only other thing with regard to the fifth count is the admissions made by defendant Haas in the statement, and there is no evidence in the record to corroborate this, there is no independent evidence that I know of, that he had knowledge in 1947 from Mr. Alprin that Mr. Alprin had received this check of two hunderd and some-odd thousand dollars and that Alprin had advised him that there were restrictions placed upon it, and that he, in assisting or preparing the 1947 tax return of Mr. Alprin, discussed the taxability of this check, and that he and Mr. Alprin came to the conclusion, after certain research, that since there was a restriction placed upon it he didn't have to report it in 1947, and that when the restriction was removed it was perfectly all right for him to report it in 1952. There is no evidence that Mr. Haas had anything to do with the preparation of his 1952 return. In fact, he never did prepare it. And there is his admission that he consulted with Mr. Alprin, that he had knowledge from Mr. Alprin and that he in some way rendered an opinion as a tax man on its taxability and its reportability in 1947.

[5798] But there is no evidence here that Mr. Haas in any way conspired with Mr. Alprin or that the advice that was rendered was knowingly done

with a false purpose. As a matter of fact his statement indicates that when he spoke to Mr. Klein about this at the time that he was going to prepare the 1947 return of Alprin, Mr. Klein told him, "This is a matter between myself and Mr. Alprin."

Now Mr. Haas did what any accountant would normally do under these circumstances. Having been told about the situation he went to Mr. Klein and he asked him, "What about it?" To determine whether or not it was reportable in 1947. Now there isn't any evidence, your Honor, in this record to show that Mr. Haas conspired with Mr. Alprin or Mr. Klein to conceal from the Government the fact that Mr. Alprin received a check for two hundred and some-odd thousand dollars in 1947.

Again we get in the realm of knowledge of a situation which is brought home to Mr. Haas by another defendant and in which he renders a tax opinion. And we submit that that is hardly evidence to hold Mr. Haas in this case for conspiring with Mr. Alprin, Mr. Klein and the others to conceal from [5799] the Government the fact that Mr. Alprin got this check.

Now I hope your Honor is as convinced as I am, and I trust you will be and I think you will be, because I think as you review this record, at least as to the defendant Haas, you will come to the conclusion that the Government has not proven a case against him under any of the counts in this indictment.

* * *

Motion of Defendant Alprin for Judgment of Acquittal

I think on all that I have said, your Honor, the defendant Haas' motion for judgment of acquittal on all counts should be granted.

[5809] The Court: May I interrupt?

Mr. Becker: Certainly.

The Court: And say to what extent I have evolved as my basis, based upon an estimated simplification of the language that deals in broad terms with hypotheses and the like. I believe this to be the test. And I would like to have the benefit, and I am inviting both Mr. Kiendl and Mr. Bender to reargue to that extent if they want to add anything to what the others may say, but here is what I say in simple language is the test, and of course the Government is invited to make its comment:

Giving the Government the benefit of all reasonable inferences that might logically flow from the evidence, if a reasonable person might conclude [5810] guilt therefrom the motion for judgment of acquittal must fail. That is what I understand in a nutshell to be the rule, at least in this circuit.

* * *

MOTION OF DEFENDANT ALPRIN FOR JUDGMENT OF ACQUITTAL

[5830] Mr. Donohue: If it pleases your Honor, I move the Court for a judgment of acquittal on behalf of the defendant Alprin with respect to each and all counts of the indictment, for reasons which I shall hereafter advance to your Honor.

* * *

[5840] Mr. Donohue: The fifth area of testimony concerning the defendant Alprin was with respect to the testi-

mony of the witness Rokoff. Mr. Rokoff testified that the books—and I think I should perhaps adopt his language—the memorandum records or photostats thereof which he presented to the Court and jury and from which he testified showed that 2850 shares of Tivoli Trading Company were sold to Mr. H. H. Klein on November 20, 1945. He testified from the books or the memorandum records of the Tivoli Trading Company that the entries showed a payment to La Economica, a corporation formed by Mr. Alprin, and of which, if my memory is correct, Mr. Alprin was president, under "Accrued Commissions and Expenses Payable."

He further testified or identified an undated receipt signed by the defendant Alprin in the amount of $500. He testified further that his own $150 subscription to the stock of the Tivoli Trading Company was cancelled late in 1945 or early in 1946. And he finally testified that there was no book entry which reflected the repayment of the $500 to Mr. Alprin.

[5841] The last area of testimony concerning the defendant Alprin was with respect to his interest in Tivoli. And may I briefly call your Honor's attention to my recollection of the references to Mr. Alprin's interest in Tivoli Trading Company by Mr. Alprin, by Mr. Klein, by Mr. Koerner and by Mr. Roer commenting from the statements made by each of these to the Bureau of Internal Revenue which were admitted in evidence.

Mr. Alprin in substance stated that in Vancouver Canada, in the summer of 1945, while visiting with his wife, Mr. Klein and his wife, Mr. Klein indicated to him a satisfaction on his part and on the part of his Canadian associates with the services which Mr. Alprin had rendered

and indicated that they would like to make him a so-called member of the family by permitting him to acquire an interest in the Harwood venture or interest in the corporation.

Some time later, according to the statement made by Mr. Alprin in evidence he gave Mr. H .H. Klein a check at Mr. Klein's suggestion made payable to Tivoli Trading Company in the amount of $500. Being told that the stock interest represented thereby would not be issued to him but would be held in escrow for him by Mr. Klein.

[5842] Mr. Alprin said that he identified his signature on the undated receipt and also said in his statement that he recalled sometime in 1952 having exhibited to him by Ellis Rosenberg, now deceased, a full page receipt which containd two paragraphs, one reciting the receipt by Mr. Alprin of the $264,000 check, and the second paragraph reciting the receipt by Mr. Alprin of the $500 from Mr. H. H. Klein.

Mr. Alprin further stated that he got a check for $264,-000-odd in March, 1947, in Baltimore from the defendant H. H. Klein as Mr. Alprin said, "in liquidation of the corporation." And that at the same time a second check in like amount also as was the first made payable to La Economica was given to him by Mr. Klein with the instruction that he hold it for Mr. Irving Koerner until such time as he, Mr. Klein, would direct that it be paid over to him, and that he did hold that second draft made payable to La Economica given to him for Mr. Koerner until March of 1952, when he said in his statement he was advised by Mr. Klein that he might then deliver the check.

With respect thereto and concerning the defendant Alprin in the statement read to the jury by Mr. H. H. Klein to the Bureau of Internal Revenue, he [5843] said in substance that he and the three Canadians owned the Tivoli Trading Company from its inception, that 2,850 shares of that corporation were issued on the 31st of December, 1945. He said that the defendant Alprin's draft in the amount of $264,000 was in the nature of a bonus "pretty near a gift."

He said further that the defendant Alprin subscribed to the Tivoli stock, but his subscription was not accepted, "That he, Mr. Klein, bought the check," and returned the money. That these receipts were prepared by Ellis Rosenberg and that they were signed by the respective persons whose names appeared thereon in his, Mr. Klein's presence.

He finally said with respect to the holding of those drafts he may have placed restrictions on Koerner's and Alprin's draft and later in inquiry by the Bureau of Internal Revenue he said that he placed no restrictions but "possibly suggested they might hold them a while."

In the defendant Koerner's statement to the Bureau of Internal Revenue he said that the defendant Alprin told him of the draft in 1947 and of Mr. Klein's instruction to hold the draft.

He testified subsequently that he received the [5844] draft on the 12th of March, 1952.

And finally on this subject in his statement to the Bureau of Internal Revenue Mr. Roer stated that he went to Baltimore with Alprin in 1947 and that at that time Mr. H. H. Klein gave a draft to him in some slightly larger

amount and that he understood that Alprin—that "he" referring to Roer—that Alprin and Koerner were also owners of stock in Tivoli Trading Company.

And may I add a final note on this subject matter, in a statement made by Mr. Haas to the Bureau of Internal Revenue he stated that upon a statement of facts made to him by the defendant Alprin concerning his acquisition of the check and the circumstances under which it was acquired, he told Mr. Alprin that he felt he was not obliged to report this draft as income in the year 1947. Mr. Haas also told in his statement to the Bureau of Internal Revenue that he and Mr. Koerner's counsel for a period of time from 1951 and 1952 held jointly the Koerner draft as escrowees, subsequent to the time it was ultimately delivered to the defendant Koerner.

Lastly there are certain documents which are pertinent to the defendant Alprin now in evidence. I [5845] refer particularly to Government's 339 and 340, they being respectively the bank records of Tivoli Trading Company, 339 in the Royal Bank of Canada, New York Agency, and 340, the Royal Bank of Canada Montreal Agency. These records show the opening account of Tivoli Trading Company included the $2850 representing the stock contributions and the closing entry included a figure of some $800,000-odd which represented the total amount of the three drafts in question.

Also in evidence, Government's Exhibits 333, 334 and 335, the records of the Royal Bank of Canada, Toronto, would show the original deposit by Mr. Alprin of the draft in question in the account of La Economica and a spiltting

up for the reasons he stated in his admission of that draft into three amounts in favor of three of the four corporations. La Economica, Marte and Aguila on the 5th day of May, 1947, and a final closing entry as of February 10th, 1949, wherein these three amounts were merged and a draft payable to La Economica in the amount $264,000 in round figures was then issued.

* * *

[5850] In the second part of our memorandum we move for a judgment of acquittal on the basis of the fourth [5851] count, and we do on four bases:

First, we suggest to your Honor that the fourth count should be dismissed or that the defendant Alprin should be given a judgment of acquittal for the reason that either the fourth or the fifth count must be dismissed, and we reach that conclusion upon two bases: First, that the fourth count is barred by the statute of limitations, and secondly, that the fourth and fifth counts charge a single conspiracy encompassed by the fourth count. The fifth count therefore should be dismissed, and that we extensively brief for your Honor.

* * *

[5852] Now with respect to the fifth count, we move, your Honor, for a judgment of acquittal on the fifth count, and do so for three reasons:

The first reason which I would like briefly to call to your Honor's attention by reading from our prepared memoranda is that a judgment of acquittal on the fifth count is requested for the reason that there is insufficient evidence of conspiracy or of unlawful action or of impeding collection to warrant submitting the fifth count to the jury.

If the fifth count should stand independently, then it must be read as alleging a conspiracy, beginning on June 1, 1946, to defraud the United States by impeding the Treasury Department "In the collection of the revenue; to wit, income taxes." This conspiracy is alleged to have consisted of a concealment of the nature of the business activities and the sources and nature of the income of the defendants under that count. The only particularization of the conspiracy is that it was allegedly a part of it that Alprin, Koerner and Roer would file returns in 1952 (except for Roer who filed in 1950) representing certain net income as capital [5853] gain "For the purpose of concealing the nature and source of the net income received by the defendants during the years 1944, 1945, 1946 and 1947."

The revenues whose collection was allegedly impeded by such concealment were taxes from all the defendants in that count.

It it not at all clear what the fifth count charges. See, for example, the discussions of that count in the course of the trial at stenographer's minutes page 64, 85 and 86, 3234 and following, 4221 and following, 4248 through 4251, 4407, 4413. On analysis, it appears to rest on either or both of two theories: The first is that the concealment of the nature of defendants' activities and the source and nature of their income was effected by misrepresenting ordinary income earned by Alprin, Roer and Koerner as capital gain; the second theory is that the concealment was accomplished by failing to report the receipt of the bank drafts from Tivoli in the year of their receipt, 1947. Neither theory, as the basis for a conspiracy charge, finds support in the evidence of this case.

With respect thereto, first, the Government [5854] has proved conflict, not concert, regarding the nature of the income received by Alprin and the others; if the conspiracy concerned the nature of the income, it ended in March of 1947.

The Government's own case fairly shrieks with the conflict of interest between Klein on the one hand and Alprin, Roer and Koerner on the other, so far as the nature of the income received by the latter three from Tivoli is concerned. Alprin and the others claim the income received in 1947 represented a capital gain, a liquidation of their investment in "the Harwood picture" through subscription to stock in Tivoli. Klein, on the other hand, asserts that they received a bonus in that year and points to an undated receipt as support for his contention that he "bought" their investment in Tivoli and repaid them in cash in the amount previously subscribed by them. If Klein, Alprin, Rokoff and the others referred to in the fifth count were conspiring to conceal the nature of the Tivoli bank drafts, it seems unlikely that they would now tell such opposing stories. But what is more incredible is that, if the parties were acting in concert to cloak ordinary income as capital gain, Rokoff would, [5855] under Klein's general instructions, have placed in the Tivoli books in March of 1947, an entry characterizing the payments to Alprin and the others as "accrued commissions and expenses payable" rather than as liquidating dividends. Similarly, why would Klein or Rokoff prepare receipts in late 1945 or early 1946, according to Rokoff's testimony, stenographer's minutes at page 4936, canceling the stock subscription and thus eliminate the basis for taking the payments as capital gain?

The obvious answer is: If the conspiracy consisted of setting up ordinary income as a capital gain, it ended either before it began—when the receipts were procured in 1945 or 1946—or it ended almost immediately after it began, in March of 1947, at the very time the drafts to Alprin and the others were issued. If a conspiracy did come into being in June of 1946 it ended at the latest in March of 1947 and hence is barred by the statute of limitations, whether it be three or six years.

If, on the other hand, the concealment is said to have been accomplished by Alprin's holding his draft and Koerner's draft pursuant to Klein's instructions, and Roer's holding his draft in the [5856] same fashion, there has been a complete failure of proof that there was anything unlawful about the holding.

The Government has made no attempt to prove anything about the holding of the drafts other than the fact that they were held. No proof has been offered that the drafts were not restricted; or, if they were, the validity of the restriction. Apparently, the Government would like to introduce a concept akin to that of the anti-trust laws—that is, that certain actions, such as price fixing, are illegal per se. No such doctrine exists under 18 U. S. Code, Section 371. The holding of the checks from 1947 to 1952 is not illegal, without more. It can be illegal only if proved to have been held for some unlawful purpose within the terms of 18 United States Code, Section 371. No attempt has been made to do that here.

The only evidence regarding the holding, aside from the bank records and tax returns, is to be found in the statements of the defendants to Internal Revenue. Since the

Government has not sought to refute those explanations, it would be inviting gross speculation to ask the jury to disregard them.

[5857-58] There is another facet to the "holding" problem. Presumably, it is the Government's position that the failure to deposit drafts in 1947 and to report them in the tax returns for that year, and for the succeeding years to 1952 (1950 in the case of Roer), impeded the collection of the revenues by preventing the Treasury Department from learning of the existence of these funds and preventing assessment of tax thereon. This view must fail on both factual and legal grounds.

It will be recalled that Alprin, Klein and the others charged in the fifth count were allegedly seeking to do everything they could to cover up the nature of their business activities and to cover up the source and nature of their income as a means of impeding the Government in the collection of its revenues from the defendants in that count, quoting Mr. Bauman, stenographer's minutes page 3234.

It was a part of that conspiracy that Roer and Koerner, who are not named in that count (and presumably Alprin, who is so named), would so secrete their income and cover up their proceeds from the Harwood deal as a means of aiding and assisting the named defendants, quoting Mr. Bauman, stenographer's [5859] minutes 3235 to 3236.

Yet, at the very time Alprin and the others were not reporting the receipt of their drafts in 1947, allegedly for the purpose of covering up the income from the Harwood deal, Klein himself was reporting his income from the Harwood deal in his return for the year 1947, filed in May of 1948. Indeed, a jeopardy assessment—indicating on its face

that the Government knew all about the Harwood deal, was levied in March of 1948. It is incomprehensible that Alprin and the others could have been assisting Klein to cover up the proceeds of the Harwood deal at the very moment that Klein was making full disclosures of the same. It would be comprehensible only if the drafts were alleged to be Klein's money. But the Government has specifically and unequivocally rejected that notion (Stenographer's minutes, page 4405).

What appears from the Government's proof in this case is that, at most, Alprin, Roer and Koerner, may have individually filed false returns in 1952 or that Klein individually is lying about the Tivoli drafts. But in view of the failure to establish which of the versions in truthful and [5860] the complete failure to prove a conspiracy, the fifth count must fail. The discussion in *Marcante* v. *United States*, 49 Fed. 2d 156, from the Tenth Circuit is particularly appropriate here, briefly quoting the Court:

> "for reasons of its own, the Government has not seen fit to charge them with such individual violations of the National Prohibition Laws * * * (Nor did) the Government . . . see fit to charge the appellants separately with the two conspiracies disclosed by the evidence. The Government charged appellants with membership in a conspiracy, the purpose of which was to engage in a general plan to violate the liquor laws in a state-wide way * * *
>
> "We cannot find any evidence that the appellants knew of any such general conspiracy * * *. Nor can we find any circumstances from which a jury might legitimately find that Marcante, or Bell,

> had any other purpose in mind than that of carrying on their own individual operations under a promise of protection. * * * Two conspiracies not alleged are proven, and there is [5861] no proof of the single conspiracy alleged."

It is respectfully submitted to the Court that there is an insufficiency of evidence under the fifth count to warrant submitting the case to the jury.

And we finally—and I shall not take the time to read it to your Honor—I have asked your Honor to direct a verdict of acquittal with respect to the defendant Alprin on the fifth count for the reason that the three year statute of limitations is applicable to the fifth count and therefore that count too is barred by the statute of limitations.

Now before closing I would like briefly on the matter which your Honor suggested shortly ago that the Court itself had certain notions concerning the position in which the Court finds itself concerning the status of the evidence in respect to a motion now made for a judgment of acquittal. May I briefly reading from our memorandum say to the Court that assuming the evidence to have been accurately described by me with respect to the defendant Alprin it becomes apparent that to give this case to the jury in this status of the evidence would be to invite on their [5862] part the sheerest kind of speculation and conjecture. Aside from the undisputed fact of association with Klein over a period of years, there is absolutely nothing in this record tying Alprin to any crime. All that the Government can point to is the suspicious circumstance that Alprin received a check for $264,000 in 1947 and held it until 1952. But a

suspicion arising from the payment of a large sum of money, without more, cannot suffice to make a person criminally liable for an offense committed by another. Nor can an awareness that corporations are being used for legitimate tax avoidance become, by a mysterious transferrence process, participation in the formation of sham corporations and in cloaking them.

In case after case, appellate courts have reversed convictions and ordered entry of judgments of acquittal where there was no more than suspicious circumstances.

Whatever the rationale in which the particular decision has been formulated, the import of these decisions is clear:

"It is the function of the judge to deny the jury any opportunity to operate [5862-A] beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy."

* * *

[5863] A particularly good illustration of these propositions is to be found in the recent case of Cooper v. The United States— and I hope your Honor will pardon me if I return again to my own Circuit, 218 Fed. (2d) page 39, a 1955 decision of the Circuit Court of the District of Columbia. Applying the rule of the Curley case to the question of the sufficiency of the evidence to warrant sending to the jury a charge of aiding and abetting, the Court reversed and ordered entry of a judgment of acquittal, saying:

> "Upon the evidence in the case at bar a reasonable mind must necessarily have had a [5864] reasonable doubt as to Cooper's guilt. The total absence of any semblance of direct proof against

> Cooper, in the presence of so much direct proof as to the robbery and the robbers, must, we think, make a reasonable man have a reasonable doubt upon the evidence as it stood. That the getaway car was being bought by Cooper, that he was a friend of Bullard, who was clearly one of the robbers, according to this record, and that he asked his cousin to corroborate his being in North Carolina creates suspicion. Such evidence might raise a question in a reasonable man's mind. But that is not enough. Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what could necessarily be only surmise and conjecture, without evidence."

It is respectfully submitted that if this case is permitted to go to the jury, the result will be the wildest kind of conjecture. Suspicion and speculation will govern the jury's deliberations. Tax awareness will automatically be transmuted into participation in [5865] a scheme for tax evasion, without any evidence to support the transmutation. There is nothing in this record from which a rational inference of criminal activity on the part of the defendant Alprin may be drawn. A judgment of acquittal should be entered as to him on all counts of the indictment because the evidence is insufficient to take the case to the jury.

In concluding, if it please your Honor, may I be permitted in order to preserve the record to move also for a judgment of acquittal on the basis of a motion attacking

the indictment as being in violation of the rights of the defendant Alprin under the Fifth Amendment without further arguing the matter at this time.

Mr. Becker: If your Honor please, I happened to be up there when you quoted that test of yours. Would you be good enough to read it to me, because I didn't get it down when I was standing there.

The Court: "Giving the Government the benefit of all reasonable inferences that might logically flow from the evidence, if a reasonable person might conclude guilt therefrom the motion for judgment of acquittal must fall."

Mr. Kiendl: If your Honor please, you have invited suggestions about it. May this be an appropriate [5866] time for us to make them?

The Court: Well, except that in fairness I think we ought to hear the argument of the last defendant and then I will stay as long as is necessary to discuss them.

Mr. Kiendl: Fine.

* * *

[5910] New York, June 23, 1955,
10.30 o'clock a.m.

Trial resumed.

The Court: Before you proceed, Mr. Bauman, I think it might be wise if I receive suggestions from counsel with respect to the formula that I proposed and we suspended that in order to give you an opportunity to prepare your argument.

Mr. Kiendl.

Mr. Kiendl: If your Honor please, we will be very brief. The test that your Honor suggested is substantially satisfactory, but we would suggest these possible amendments: Giving the Government the benefit of all reasonable inferences that might logically flow from the evidence if a reasonable person could—instead of "might"—conclude guilt beyond a reasonable doubt, despite the decision in the Costello case—could conclude guilt beyond a reasonable doubt therefrom the motion for judgment of acquittal must be denied; and [5911] conversely if a reasonable person could not conclude guilt beyond a reasonable doubt therefrom the motion must be granted.

The Court: Let me get that subsequent language from the words "and conversely."

Mr. Kiendl: If a reasonable person could not conclude guilt beyond a reasonable doubt therefrom the motion must be granted.

Those are the only suggestions that we have.

The Court: I would be prepared to accept all suggestions made except the insertion in both places of the words "beyond a reasonable doubt."

Now aside from Costello there come to mind Feinberg, Pugliese, and Dennis where Learned Hand has distinctly said to the contrary of what you urge, Mr. Kiendl.

Mr. Kiendl: I don't have any doubt about that at all, your Honor.

The Court: Well, I get my sailing orders from my Circuit Court, and here is what he said——

Mr. Kiendl: Well, we are asking your Honor to follow the sailing orders of the Court that is above the Circuit Court, the United States Supreme Court, and that in

the Holland case clearly in a net worth [5912] case used the words "beyond a reasonable doubt" in connection with this test.

The Court: Well, I am not persuaded that it has been so definitely disposed of, because there is a long line of cases, not only in this Circuit,—I can't think of any in the Supreme Court now,—where they point out that for the testing of whether a motion for a judgment of acquittal shall be granted or denied, the test is the same in the civil and criminal case.

Mr. Kiendl: I appreciate that, your Honor.

The Court: And therefore the judge who has to be objective about it, he can't take his impression, he can't take the impression of a given jury, he must turn to that composite robot, the fictitious man that we have erected to solve these problems for us in the law, the reasonable man.

Now then, as I understand the decisions, not what the reasonable man will consider beyond a reasonable doubt to be the test, but merely a preponderance. Then, as Learned Hand says, the defendant must be content with the charge to the jury as to the weight of evidence i.e., that before they can convict that particular jury must be persuaded beyond a reasonable doubt.

Mr. Kiendl: I appreciate, if your Honor please, [5913] that Judge Learned Hand has taken that position in more than one case, but it seems to me the language of the Supreme Court in the Holland case is in accordance with the test as we have indicated to your Honor, and there the language which we have cited in our main brief——

The Court: Yes.

Mr. Kiendl: —just a sentence or two:

"The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The set of standards of criminal law are applicable to net worth cases just as to the prosecution for other crime. Once the Government has established its case. . ."

[5914] The Court: Well, that doesn't run afoul with what I said. That means that ultimately, once the case goes to the jury, the jury must be satisfied beyond a reasonable doubt of every element, and it applies to a net worth and expenditure case just as it does to a case with respect to taxes. I don't recognize that language, and I will confess that case was not in mind when I was discussing it with you. I haven't recently read the case. I read it when I got the slip sheet, but I don't have it in mind at the moment.

But in so far as the language you refer to, I recognize nothing in that language that runs afoul with what I have said that the Circuit Court and what I say Learned Hand has said and that is this, that in determination of a motion for judgment of acquittal all that has to be is what would a reasonable man say, not beyond a reasonable doubt but whether there is a sufficient preponderance for the judge to decide that a reasonable man might say that there was guilt, provided he was satisfied, or the jury, after it got it, was satisfied that there was proof beyond a reasonable doubt. I don't know, it may have been inartistically phrased, but I think——

[5915] Mr. Kiendl: I think what your Honor in substance is saying is that in a criminal case the rule would be

exactly the same and precisely the same as in a civil case.

The Court: i.e., on the motion for judgment of acquittal vis-a-vis dismissal of the complaint.

Mr. Kiendl: Exactly.

The Court: Yes.

Mr. Kiendl: And we think under the language of the Supreme Court case which we have cited and discussed in our brief the words beyond a reasonable doubt should be inserted. We are appreciative of the decisions that your Honor has in mind in this circuit, and maybe your Honor has read the decision of Mr. Justice Frank concurring in the Costello case, in which he says that very thing.

The Court: Yes. Of course, is that the one where he invites a determination?

Mr. Becker: Yes.

The Court: Was the Holland case after that?

Mr. Kiendl: No, before that.

The Court: At least that would be indicative to me that so far as this circuit is concerned—then again I have sailing orders—if this circuit has said [5916] the Supreme Court has not decided it I wouldn't presume to tell the Circuit Court that they were wrong and that the Supreme Court had.

In any event, I will accept the proposal of the test as you outlined with the emasculation, which has become a very current word in this trial, with the emasculation of those two clauses "beyond a reasonable doubt," and I feel that at least Pugliese, Dennis and Fineberg indicate that is the course I should pursue.

So that the test I will apply will be this: Giving the Government the benefit of all reasonable inferences that

might logically flow from the evidence, if a reasonable person could conclude guilt therefrom the motion for judgment of acquittal must be denied, and conversely, if a reasonable person could not conclude guilt therefrom the motion must be granted.

Does anyone else wish to be heard on this question?

Mr. Bauman: Only to this extent: I think that the test your Honor suggested yesterday does of course represent the law in this circuit; I am not sure that I recognize any semantic difference between "might" and "could" of sufficient degree that would [5917] impel me to disagree with Mr. Kiendl or your Honor's adoption of the word "could" rather than "might."

* * *

Of course your Honor has properly cited Fineberg, and I believe yesterday your Honor referred to Greenstein, wherein Judge Learned Hand said, and this is his exact language and I should like to read those two sentences:

> "Courts will not try to measure the cogency of the evidence or to draw a line between what should satisfy a reasonable man and what should satisfy him beyond a reasonable doubt. The difference begins and ends with the admonition to the jury."

The Court: Yes.

Mr. Bauman: Now that is the fact. And the only comment I would make with relation to the test as your Honor now suggested is that I do not remember, unless it is implicit in the language which I have read, but I do not specifically remember reading the preponderance of the evidence test. On the contrary, my recollection is that——

The Court: Oh, no. Let me interrupt. That is only an obiter dicta that I had mentioned in the course of the argument, indicating that I feel [5918] that where a community test is the same civil and criminal, that therefore the judge would accept the lesser degree in determining whether it should go to the jury, i.e., the civil test, and the civil test of course is preponderance, it is not beyond a reasonable doubt. But if I left the impression that that appeared in any of the decisions, I want to dispel it immediately.

Mr. Bauman: With relation to United States v. Sherman, which was a theft from interstate commerce case, the Court of Appeals said that the test is whether the evidence will rationally support a finding in favor of the party having the affirmative. And having that in mind, sir, the test that your Honor proposed yesterday and the test with the substitution of the word "could" rather than the word "might" is acceptable to me in the determination of these motions because it does, indeed, as your Honor has said, represent the law in this circuit, consistently held over a long period of time.

The Court: Yes. All right.

Government's Argument in Opposition to Motions for Judgment of Acquittal

[5919] Mr. Bauman: May it please the Court, the Government respectfully urges that the motions for judgments of acquittal made in each case yesterday be denied.

In order to act upon these motions it occurs to me that the legal questions are capable of being briefed and that in

my judgment, at least, the major question presently before your Honor is the factual question. And in order to determine that factual question of sufficiency, whether these corporations are sham, it is necessary to review the evidence that has come before the Court, not just the innocuous self-serving evidence that has been elicited on so-called cross-examination of the Government's witnesses but all the evidence, having this case in mind as a coordinated whole, from the beginning until the early part of this week, when the Government resfed.

As the Court has found, I am sure, this Harwood deal had its inception in conversations held in Canada during the year 1943. And although it does not clearly appear exactly who was present at these conversations in Canada, I think this much is indisputably in the record:

1. H. H. Klein was there.

[5920] 2. I. J. Klein was there.

3. On one such occasion at least McLennan was there.

4. On one such occasion at least the defendant Roer was present and was indeed asked to solicit some distributor in the United States in connection with the sale of this whiskey, which, so far as this record discloses, had never been sold before.

Roer at this time had been employed by Klein, had been employed by United Distillers of America, and was therefore obviously known to Klein and presumably to the UDL interests in Canada.

[5921] And with relation to the nature of these discussions and its bearing on what was in Klein's mind from

the very day this deal started, I refer to the statement that defendant Klein read into the record, and I believe I am quoting from page 5273 of the record, when Klein was asked a series of questions as follows:

> "Q. In August of 1943 through negotiations with I. J. Klein, A. L. McLennan and George W. Norgan, Directors of U. D. L. of Canada, Ltd., Vancouver, B. C., did you arrange to buy Canadian whiskey? A. What Canadian whiskey?
>
> "Q. Any Canadian whiskey. A. In the year of what?
>
> "Q. 1943. A. No, we agreed to go in partnership in the sale of Canadian whiskey for Central and South America."

Now there is the defendant Klein's statement of what was intended from the begining by him, a partnership consisting of himself, McLennan, Norgan, and his brother, Isidor J. Klein. And apparently sometime thereafter, for reasons at this point best known to the defendant Klein and his co-conspirators, it was decided to use the corporate form. And I say use the corporate form because the Government contends in this case, your [5922] Honor, that from the beginning to the end the form, the shell, was used but there was no business activity and no real indicia of corporate operation.

In any event, in March of 1944, and this leads me into the first subdivision of my argument dealing with the defendant Klein's good faith and that of his co-conspirators, Klein embarked on what I have come to regard as his

opinion shopping expedition. And by that I mean that starting on or about March 3, 1944 when he obtained his first, to our knowledge at least, opinion, which is Government's Exhibit 21 in evidence, from that time forward every time Klein got an opinion he didn't like he went out and bought another one.

Now I want to take those opinions, if I can, one by one, and I want to start with the one of Mr. Halperin which, as I say, is dated March 3, 1944, but before saying so, sir, may I call to the Court's attention that by this time his negotiations with Koerner had been proceeding, according to the evidence in the case, for a substantial period of time, so the Harwood whiskey transaction was clearly in his mind when he went to Mr. Halperin and asked for this opinion.

Now on page 3 of that opinion there is a very interesting sentence or paragraph and the Government [5923] submits that is is on the basis of that paragraph that that was the last time Mr. Halperin's opinion was solicited so far as anybody knows in connection with this Harwood deal. And it reads, with the Court's permission, as follows:

> "Another provision which must be kept in mind is the section dealing with foreign personal holding companies wherein the American shareholders are required to report and include as taxable dividend income their proportionate share of the corporation's earnings. Since the proposed Cuban corporation will be an operating company, this provision will likewise not be applicable. Thus it appears that merely subscribing in cash and owning stock of a

> foreign corporation which is actively engaged in the conduct of a business does not involve any tax problem."

And the significance of the first sentence of that opinion, sir, is that Mr. Halperin put Mr. Klein on notice then, as set forth in the preceding pages of the opinion letter, which I do not intend to trouble the Court with: If you form a Cuban corporation or a Panamanian corporation or any number of Cuban and Panamanian corporations designed for a business purpose [5924] and entered upon such a business purpose, you are on firm ground. But in effect, said Mr. Halperin to Mr. Klein, if those are nothing but shells, if they are fronts for your operations, then the money you receive or the money that is paid over to these shells will be immediately taxable to you as dividends, as current income.

And therefore, it was within a matter of a month that Mr. Klein had Mr. Alprin go over to see the defendant Haas, and your Honor is familiar with that first opinion letter, which I believe is dated April 17, 1944. Your Honor is familiar, too, with the fact that so far as that letter was concerned the defendant Klein was taking no chances on getting any opinion like the one he got from Halperin. And the reason I say that, sir, is that the record is abundantly clear that what the defendant Alprin had before him was the agreement of April 18th and not the memorandum agreement of April 20th.

Now that letter of April 20th, your Honor, I am fully familiar with your Honor's familiarity with the record and

so I shall not attempt to summarize it, because you remember it very well, I am sure; but we have contended, and I respectfully submit, the letter itself proves that [5925] it put control of this Harwood whiskey deal right in the hands of Hyman Harvey Klein.

And so the failure to show that document to the person who was to render an opinion colors the validity of the opinion and colors the so-called good faith of the defendant Klein in relying on such an opinion, because I think we can all agree that if a man goes to a lawyer and asks a lawyer for an opinion and deliberately withholds facts he cannot then hide behind that opinion as showing his good faith in his operations.

And so a year later, apparently someone was troubled by Klein's manipulations and operations, and that Alprin went to Haas and said, "I want another opinion," presumably, and he quite obviously said something more, because in the last paragraph of that second Haas opinion there was again some language that Mr. Klein apparently did not like, and that was to the effect—and I know the Court has in mind that on that occasion the defendant Haas did not have before him the April 20th letter—but that language was to the effect that if Klein continued to do what he was doing in the operation or in the ostensible operation of these corporations that he was creating a very serious tax problem for himself.

And what did the defendant Klein do on that [5926] occasion? Within six weeks he is back down in Baltimore buying another opinion from Mr. Burke, and on that occasion, as Mr. Burke testified here, Burke did not have before him the April 20th letter.

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Now I submit, sir, that on that state of the record a jury can rationally conclude that when Klein obtained these opinions he was obtaining them not in good faith to guide him, but rather as a means of—as an insurance policy against the day when he would be brought before the bar of justice.

There has been further talk in the record about an opinion and in Mr. Kiendl's brief about an opinion by Root, Ballantine. I for one to this day have not seen such an opinion. I assume it exists because Mr. Kiendl has stated it exists. But it is not before the Court, and on the record of opinions I say that the triers of the fact in this case are justified in drawing a conclusion that when Mr. Klein sought the opinion of Root, Ballantine he dealt with them no more truthfully than he did when he dealt with Maurice Haas or than he did when he dealt with Mr. Burke, because, in not one of these opinions, sir, is there an indication that this defendant ever told any of the people from whom he wanted opinions the full story of his activities, and indeed [5927] never even let them see the papers that bore upon the taxability of his operations.

Well, let's return to the operations of Mr. Roer. It is clear I think beyond question that Mr. Roer brought Mr. Koerner and Mr. Klein together. Mr. Koerner was a dollar-a-year man for the O. P. A., and since the jury is not present I need not worry about prejudicing anybody by saying of pecular attractiveness to people in this liquor deal. He was also connected with one of the top whiskey houses in the United States—a whiskey house without whiskey, as your Honor has heard, during the period of shortage.

Indeed, I think I should like to withdraw the word "whiskey" house, because actually it was a grocery firm that had a whiskey department. It was a firm of good reputation.

Koerner met Klein and continued to meet with him and continued to work out the details of his $30,000,000 deal as it later eventuated without the knowledge of one of his superiors at R. C. Williams. Throughout this time Koerner was neither an officer or director of that company. And when the time came for him to feed him, that the deal had been worked out, when in fact all but the most minor details had been arranged, [5928] he then for the first time called it to the attention of his superiors at R. C. Williams.

I say all but the most minor details. I mean that, because during the war period it was inevitable that there would be a shortage of whiskey. And the important part of this transaction from Williams' point of view was to get whiskey. And all the other facets of the arrangement were to them details. Mr. Jaburg, according to the testimony sent Koerner over to see Mr. Jacobs, the corporation's attorney, and he appears there with Morris Alprin, one of the defendants in this case. There is a series of conferences, and in this series of conferences Mr. Jacobs gets the impression, and indeed is told by Morris Alprin, to the best of my recollection of the record, that he is representing some Canadian interests or the Harwood people in Canada, and he submits a series of drafts to Jules Jacobs, containing substantially the provisions that were ultimately agreed upon.

When the time comes to sign this agreement Jacobs for the first time notices that the agreement, and indeed some

of the drafts which he had previously read, do not bear the name of the Harwood Company or Klein or any other Canadians, but instead bears the name [5929] of a Cuban corporation. And you remember that his surprise was such that he called Mr. Jaburg, the president of R. C. Williams, when he noticed that for the first time and said to him, in effect, "What is going on here? I thought that we were dealing with the Harwood Company and these Canadians."

And Mr. Jaburg said, "Well, it doesn't make any difference. Go ahead and proceed with the matter."

And during the course of those negotiations Jules Jacobs asked the defendant Alprin, "What's the idea of this Cuban corporation? I didn't realize that this was a Cuban operation or that it had anything to do with Cuba." And I am sure you know I am paraphrasing the record generally—and the defendant Alprin said to him, "Well," he said, "it is a tax situation" or "a tax problem." And he thereupon, or about that time gave Jacobs a copy of the first Haas letter.

[5930] So that it seems to me, sir, that the proof is clear that this case and this operation had its inception in acute tax awareness by the defendant Hyman Klein. Before he ever signed this agreement he had been warned by his own attorneys about the consequences of the acts upon which he later embarked.

Thereupon the sales of whiskey went forward. And lest anybody thinks I am conceding that whiskey was sold by UDL or any of the UDL subsidiaries to Agencias Desfiladores or Ramsey Scott, I want the record to indicate now that that is not my position. Nor is it my position

that whiskey was sold by UDL to R. C. Williams. My position is what it was when I opened in this case: That the whiskey was being sold by four partners up in Canada to the people to whom it was eventually shipped in the United States, and that indeed R. C. Williams in this case was nothing more than a conduit or a pipeline for the receipt of moneys by Klein.

And I shall come to my basis for making that statement in just one moment.

The whiskey deal went forward. Whiskey was sold at a great rate, particularly during the years [5931] 1945 and 1946. And some time during that period, around January 1st, 1946, it was decided that the nominee corporation in dealing with R. C. Williams, Agencias Destiladores, was to be changed, and something new by the name of Ramsey Scott was to be substituted in its place. And what was the reason that Morris Alprin gave when Jules Jacobs asked, "Why are you changing from Agencias Destiladores to Ramsey Scott?"

Morris Alprin said, "It's a tax maneuver."

Now here we are not concerned with the credibility of Jules Jacobs as such. In the first instance he said he was not sure of the language, whether it was "tax problem" or "tax situation." But as to his conference on the occasion of Ramsey Scott being substituted for Agencias Destiladores he said repeatedly that Alprin told him that it was a tax maneuver.

That, sir, is the entire history of these 17 corporations that even pretended to be in the whiskey business—a tax maneuver.

The Court: But possibly a Cuban tax maneuver.

Mr. Bauman: Possibly a Cuban tax maneuver, but undoubtedly, sir,——

[5932] The Court: A tax maneuver.

Mr. Bauman: ---a tax maneuver, and an American tax maneuver where one of the four members of this combination was an American citizen required to pay American taxes in the United States.

And I respectfully submit, sir, that while the Cuban tax maneuver may have been in mind, that came into mind with the addition of the Panamanian corporations, and I intend to come to that in a moment. But a tax maneuver quite obviously, sir, of infinitely more import to the defendant Klein and his fellow joint venturers—which term I use for want of a better one—that whether or not they paid a few thousand dollars out of 30-odd million to Cuban authorities.

Now I have said that R. C. Williams was a pipeline, and I think that proof has made that perfectly clear. My reason for saying that is the letter of credit arrangements that these various companies had. R. C. Williams put up a letter of credit for the benefit of Agencias. At first it was a three-day letter of credit and then it became a seven-day letter of credit and that was quite obviously because in some instances Williams wasn't getting its money quickly [5933] enough, and why should it be paying Klein the fantastic amounts of money involved here before it received the money from the distributor when instead of getting its regular mark-up as a whiskey concern it was getting one dollar a case.

And so I have no doubt, sir, that the term of the letter of credit was extended at Williams' request from three to seven days, because it makes no sense for Williams to pay its money to Klein before it received its money from the people whom it was billing.

But at any event Williams had its letter of credit up. And the customer who presumably was buying from Williams had a letter of credit up running to Williams. The customer's letter of credit was a sight letter of credit. The Williams letter of credit to Agencias was a seven-day letter of credit. In every case where whiskey was sold to an individual—and my recollection is that there is no indication of sales to monopoly states in this record—there was talked about a great deal but I don't remember it ever happening—in every case where whiskey was sold to individual corporations R. C. Williams had its money in its pocket by the time [5934] it paid Agencias Destiladores. And that, sir, is why I say that it was nothing more than a pipeline—not the whole story—but one facet and why I say it was nothing more than a pipeline for funneling money to Klein. It had no risk at all. And it undertook no risk in its financial dealings with anybody.

Another reason that I say that R. C. Williams was a pipeline, a mere conduit for the benefit of Hyman Klein and his corporations, is the situation of the defendant Irving Koerner. I think the proof has established to a point where any jury can reasonably come to the conclusion that Irving Koerner at the time that he was involved in the Harwood whiskey venture was not only not consulting his superiors at R. C. Williams on any of these matters, but

was under the active domination and partnership as witnessed by his later payment of $264,000 of Hyman Klein.

I think this jury can reasonably come to the conclusion that Koerner was Klein's man at R. C. Williams, because, as we shall see in a moment, that is what his reputation was and that is what he in effect was with people in the whiskey business at that time.

[5935] Now I admit, sir, that if I have a scarce commodity and I think a certain person might do a fair marketing job for me I might want to see him employed by my distributor for my benefit, but in this case it is clear that every one of Koerner's actions was in effect dictated by Klein, was in effect dictated by Morris Alprin who wrote letters for signature—not necessarily of a legal nature; and if they were of a legal nature R. C. Williams had counsel whom it was paying I am sure substantial fees to handle its legal business—but you have the picture of a combination of Morris Alprin, Irving Koerner and Hyman Klein handling this Harwood business in the name of Williams, but for themselves.

I submit, sir, that is an inference that this jury can properly and rationally draw.

Now I have mentioned some of the letters that Morris Alprin wrote, and I refer specifically to Government's Exhibits 117, 118, 119 and 120, which your Honor will remember was a series of letters identified—well, we started to have them identified by the FBI typewriting and disputed document expert, but concededly the drafts of each one of those documents, word for word, with the letter that was eventually [5936] sent over the name of R. C.

Williams by Irving I. Koerner, were prepared on the typewriters in Morris Alprin's office.

And I submit to the Court that a reading of those letters, which I do not propose to do now because your Honor has copies of those exhibits, indicates that almost every one of them, in my judgment three out of the four, has no connection with any legal business. They have no connection with the rendition of any legal advice. They deal with the business of conducting transactions in Harwood; and in the name of R. C. Williams. And what earthly connection, what earthly justification is there for one of Harwoods—one of Agencias' numerous counsel writing letters of a non-legal commercial nature which are later parrotted by Irving Koerner in the name of R. C. Williams?

But I think the most important or one of the most important facets of the evidence on sham is Koerner's own conduct and Koerner's own interrogation by Armitage. If your Honor remembers that interrogation in detail you will remember that Koerner told Armitage that he was dealing with the distillery, that Hyman Klein was the—and this is [5937] Koerner's language—"Mouthpiece of the distillery." You will see, too, that Koerner in that statement barely remembered the existence of Agencias. Agencias to him was a name. It meant nothing. It was a depository for what he referred to in that statement as "commissions."

Now when he talked about commissions he was talking about the difference in the amount of money paid to the distillery and the amount of money, $19.05 billed to R. C. Williams.

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Throughout Koerner's correspondence — and your Honor may have thought that I was laboring a point during the presentation of the Government's case in putting into the record letter after letter wherein Koerner referred to Hyman Klein as a "representative of the distillery."

If your Honor wishes the reference numbers, the exhibit numbers, I can give them to you, but I am sure that you remember those instances.

And one sticks in my mind particularly where he said that he was going to talk to the distillery on a certain day on a week-end; it appeared clearly that he talked to H. H. Klein in New York on that occasion; and then wrote another letter back to the [5938] third party saying he had spoken to the distillery and the distillery's answer to his problem was thus and so. So it is clear that this jury could find that Irving Koerner, Klein's man at R. C. Williams, and a member of this conspiracy, equated Agencias Destiladores—equated Hyman Klein with the distillery.

The Court: Is that the letter where they asked for more pints and half pints?

Mr. Bauman: That's my best recollection, your Honor.

I have come during the course of this trial learned not to dispute your Honor's recollection.

The Court: No, I am asking. I am not making a statement. I merely inquire if that's the letter you were referring to?

Mr. Bauman: Yes, I believe it is.

The Court: Yes.

Mr. Bauman: This is, the Government argues, a matter of great significance, because if R. C. Williams was

indeed a free agent, if Koerner was indeed representing R. C. Williams, isn't it peculiar, isn't it indeed evidence of what the facts were when that very person of R. C. Williams charged with the [5939] responsibility of handling Harwoods theoretically doesn't acknowledge in his day to day operations the existence of Agencias Destiladores? To him Agencias Destiladores is a name on the contract.

The Court: May I interrupt with regret, but my purpose in asking whether that is the letter you referred to—and I had a purpose—was because it would appear to me that the answering of that question, how liquor can be bottled, could be obtained only from the source of the liquor, from the people who had the bottles and knew whether they could give them more pints and half pints. You prefaced your comment about that particular incident by saying that that one letter sticks in your mind. It seems to me that logically that would be the only place that Koerner could find out whether his customers could get more than the run of shipments of fifths—to get more pints and half pints.

Mr. Bauman: That would be so, sir, if this was the only letter. If this was the only letter——

The Court: I recognize that, but you indicated that that one particular letter was indicative to you, it stuck out in your mind, if I recall your language,——

[5940] Mr. Bauman: I remembered it particularly.

The Court: And that to me falls in the category that it may be distinguished from the other letters, and that is that I can't recognize any better place to find out whether they could have changes in packaging than the distillery.

Mr. Bauman: That is perfectly true, Judge, but even so, Koerner was not calling I. J. Klein or Norgan or McLennan or anybody else at the distillery about this. And he talked only in this period so far as the record shows to H. H. Klein. And read against the other correspondence, letter after letter put into the record through Armitage, where it is clear beyond question, I respectfully submit—certainly clear enough to have the jury pass upon it—Irving Koerner equated Hyman Klein with the distillery; the distillery's mouthpiece. He was to Irving Koerner the distillery.

My recollection is that in that Armitage statement Irving Koerner was asked, "To whom did you look for the performance of the Harwood deal?"

And Irving Koerner said, "I looked to the distillery."

Now with relation to Williams being a pipeline [5941] what was the power of Williams to pick distributors? To pick these people who were to get 60 cents a case? And your Honor knows that 60 cents a case in this situation came to over one million dollars.

The defendant Klein's argument in brief wherein he persists in this fiction that R. C. Williams had anything to say about the appointment of any but—my recollection is, seven or ten of the smallest of these distributors, his persistence in this fiction is astonishing in the light of the record. And the reason I say that, sir, because of this million dollars in 60-cent pieces, 90 per cent according to the Government's chart on that went either to Klein's corporations, Roer's corporations, or persons designated by

Klein or Roer. And the crumb, the drop that was left was spread out among a number of R. C. Williams people.

Another reason I say that it is a fiction beyond question is Irving Koerner's statement. Irving Koerner said in effect in his statement, "I had really very little or nothing to say about the appointment of these people. These were Klein's designees. I heard about them from Klein or some [5942] occasions I heard about them from Roer who in effect delivered a message to me from Klein. In a few cases I knew that these people had been in the whiskey business but in many cases"—and I submit the most, Koerner never did know and never heard of these people, never knew them and knew nothing about their qualifications as distributors or commission men or whatever their nebulous status was. He took them because they were Klein-dictated. Klein had no power to veto. That wasn't his only power. Klein had the power to appoint and did appoint these people from the very beginning. I say from the very beginning because they were a parade of Klein's friends, relatives and old time employees. And the very letters of appointment which appointed them—I have two before me, Government's Exhibit 153 . nd 156, the appointment of Harold Cohen and J. Kaiser—the very letters of appointment were prepared by Mr. Rokoff—and I expect to talk about Mr. Rokoff a little later—in Baltimore on this stationery sent down, apparently—I don't know who signed that name of Gurri, but take the construction most favorable to the defendants on this point. It is stipulated that these letters [5943] were prepared in Balimore. The small letter "r" appears on each one of them. And after Mr. Klein had this letter typed by

Mr. Rokoff it wasn't signed by Mr. Klein in any capacity of Agencias Destiladores, although I believe in September and November of 1944 he was its president. I may be wrong about that.

The Court: Well, whose salesmen were they that were appointed, Kaiser and Cohen?

Mr. Bauman: My recollection is that Kaiser and Cohen——

The Court: I say, who did they represent? Weren't they appointed to represent R. C. Williams?

Mr. Bauman: No, your Honor. The Government's position on these people has been—and I shall respond to you directly——

The Court: Regardless of whether they did anything to earn the commissions, if they were just arbitrarily—you pay 60 cents to X.

Mr. Bauman: My own position on that, your Honor, is that they represented——

The Court: No, but I asked that question merely, Mr. Bauman, with this thought in mind: You emphasize the fact that Mr. Klein did not sign the [5944] letter. Regardless of who induced it, who ratified it, who dictated it, if you will, but if this was the appointment of an employer-employee relationship between R. C. Williams and these people then obviously Mr. Klein would not sign it. That's what I am driving at.

Mr. Bauman: I didn't make myself clear. These were not the letters of appointment; these were the letters approving the appointment by R. C. Williams signed in the name of the Cuban puppet, F. Gurri for Agencias Destiladores.

These are letters that Mr. Hyman Klein would have signed in the normal course of being a corporate officer had he not wanted to for whatever reasons he had in mind to conceal his participation in this operation. There are Agencias Destiladores' letters; not R. C. Williams' letters.

The Court: Well, you can take it and weigh it either way. They may be indicative of the intention of Agencias Destiladores to be doing business.

Mr. Bauman: If your Honor says that you may take it either way, then it seems to me that the jury must be the ones who in the long run are permitted to take it or leave it.

[5945] The Court: No, no, that doesn't follow at all. That conclusion is completely specious, and I will explain to you why.

If we only go back and remember the nature of a motion for a judgment of acquittal. It is a creature of the rule that is in effect merely a new name for the old motion for a directed verdict. And the old motion for a directed verdict goes back to the demurrer to the facts under the old practice. And the demurrer to the facts is strictly a demurrer and to put it in the vernacular the demurring party said, "So what?"

And so far conceding everything you say to be a fair inference to be gathered from the testimony in the case, if a reasonable person could conclude—and I am confining this now to the first four counts only—if a reasonable person could conclude that the initial companies that got bills—I am not even going to say purchased—that got bills from the Canadian source in activity, in form were doing business, then conceding all these facts that you say, I fail to

see how you can overcome the fact that if they were doing business they were a taxable entity, and if they were a taxable entity, the [5945-A] individuals involved therein did not evade taxes.

Mr. Bauman: Well, the answer to that——

The Court: And I will tell you what I am going to do. I am going to take a ten minute recess to give you a chance to think about it.

(Short recess.)

[5946] Mr. Bauman: As I remember your Honor's question, I would submit that the Government under the test we have adopted or appear to have agreed upon this morning is entitled to the benefit of every reasonable inference.

Now, there are some facts I assume from which several inferences may flow. In such cases, on a motion of this kind, your Honor, the Government proposes that in the light of the test it is entitled, for purposes of decision of this motion, to that inference most favorable to the Government——

The Court: Oh, yes.

Mr. Bauman: (continuing) —from a fact susceptible of several inferences. If those facts, as I am sure your Honor agrees, might not sway you as the trier of the facts, that is not the question before us.

The Court: Oh, no. You are right. It is not.

Mr. Bauman: And so with respect to every one of these facts which have been proven with respect to the Government's case, my argument is intended along the line

that, giving these facts their most favorable inference, we have a jury question.

Now I have before me some language that was [5947] used on this subject which, while not completely applicable—there was a fact differentiation in the situation—is interesting as to what one member of this Court of submitting the determination of sham corporations to a jury.

The Court: Was that Judge Weinfeld in Bruswitz?

Mr. Bauman: Yes, sir.

The Court: Of course you recall that in the affirmance the Circuit Court made it very clear that in the light of the particular facts developed in that case you get very little by way of a guide from a case, a specific case. I think we can agree that the application of the rule depends upon the given facts in a given case.

Mr. Bauman: Sir, I think that in piercing, in attempting to pierce the corporate veil, each case is more or less a specific situation.

The Court: Oh, yes, sir. That is what I was trying to say, but you said it better.

Mr. Bauman: I doubt that.

And so is this, as I said, when I referred to the Bruswitz case, quite different in its facts from the Bruswitz case.

[5948] The Court: Oh, yes. Bruswitz and Koenke, what they did was that they were shaking down the stevedores, in essence that is what they were doing, until the stevedores said, "Look, this is costing us too much, we want to take it as a deduction, and from now on we want it legitimatized. Now, you go ahead and form corporations,"

and so these fellows formed corporations and they were only a mere front—they treated the funds of the corporation as their own.

So in that posture, if we have the understanding that that was what was involved before Judge Weinfeld, I would be very happy to be reminded of what Judge Weinfeld said.

Mr. Bauman: Yes. Your Honor has stated precisely what the facts were in the Bruswitz case, no question about it. And it was for that reason that I said the facts were not analogous to the case at bar. But I think that his language is applicable in any case involving the determination by a jury of whether or not the corporate veil should be pierced, whether or not the corporations are sham

I should like, with the Court's permission, to read two short paragraphs out of that charge, if I may.

The Court: You realize that what he was doing [5949] was charging a jury. That is something a little different from a judge determining a motion for judgment of acquittal.

Mr. Bauman: Yes, I realize that. But I submit that in doing so he is stating what he conceives the law to be, in a charge that was held by the Circuit Court of Appeals of this Circuit in two places that I remember in the opinion, referred to as a full, fair and proper charge.

He said:

> "If, on the other hand, you find that the corporations in fact received the payments for a proper business transaction or that they were not created and did not serve the sole purpose of receiving funds

> for the defendants, then the money so paid to the corporations in the year 1951 may not be treated as income to the individual defendants. You may ask yourselves, Were the four corporations organized to serve as conduits to receive money from the defendants under their respective prior arrangement and in continuation thereof. In other words, were they merely a means of banking the cash for the individual defendants to be withdrawn thereafter by them as [5950] and how they pleased."

Now the reason I read that is that in adopting that language the Government contends and has contended that a jury might find the eventuality latterly referred to in that paragraph which I read to have been the facts rather than in fact that a business purpose was served. They may find, Judge, and I submit to you that on the record, taking the inferences most favorable to the Government, they could rationally and reasonably find that these were nothing more than conduits and depositaries to hold moneys for the defendants, to be deposited by them when, as and if and under what circumstances they pleased.

Now with relation, again, to the pipeline facet of the R. C. Williams situation, you have the testimony of a man named Barkin who testified that Koerner told him that Williams was used for the sake of billing; that Koerner was in charge of the Harwood account through Klein's intervention. Well, that is fair enough. I think everybody agrees on that. But that Williams was used for the sake of billing.

Your Honor has before him Davis' testimony that Koerner said he was clearing Harwood whiskey and that he would speak to Klein in an effort to get some Harwood for Davis. And when a little later they talked, Davis [5951] and Koerner, about getting some Harwood whiskey for somebody in the District of Columbia, Koerner suggested that Davis talk to Klein's representative Al Roer, which I think summarizes exactly what Roer's position was, whether he had a desk at R. C. Williams, whether in fact he made more money—I believe he did one year—than the president of R. C. Williams.

The Court: Oh, yes.

Mr. Bauman: Whatever the circumstances were, I think that the jury could infer, in determining whether or not R. C. Williams was a pipeline for Klein's manipulations and operations, that Al Roer was Klein's representative at R. C. Williams. That testimony is clear and unequivocal in the record.

Sometimes Koerner was out of town, and on one such occasion, your Honor will remember, a problem came up during Koerner's absence.

The Court: When Salvatore spoke to Klein?

Mr. Bauman: No. This was when Rudin asked him on the telephone——

The Court: Oh, yes.

Mr. Bauman: (Continuing)—how to answer a certain telegram. Koerner told Rudin to have Alprin call H. H. Klein to arrange for this perfectly normal [5952] business matter. And that, too, is a circumstance indicating I think, perhaps small, but a circumstance, indicating the concert,

indicating the nature of Alprin's participation and indicating the relationship, as I have said, between Koerner, Alprin, H. H. Klein.

Now, this is a circumstantial case. Nobody has said, "I have committed the crime of income tax evasion."

The Court: Nobody in his right mind would.

Mr. Bauman: It has been done, but not in this case. (Laughter.)

And so we must prove this case, your Honor, by a great many circumstances, some more important, some less, but each one of them, the Government submits, having its place in the mosaic which the Government hopes, when combined, will result in the conviction of these defendants not only under the fifth count but under the first three counts for income tax evasion and under the fourth count for conspiring to evade the income tax laws. And I say not only under the fifth count, because that count, it seems to me, is so clear as to really not require discussion.

You have the situation where over $8,000,000 is taken out of this company, put into a bank in Canada, most of it, Alprin takes his draft, breaks it up into [5953] three Cuban names up in Canada and lets it sit there. He holds Koerner's draft for $264,000.

The Court: Excuse me. Did Alprin break it up into Cuban names or Panamanian names?

Mr. Bauman: Well, they are Spanish names, Judge.

The Court: All right.

Mr. Bauman: I would assume they were—as a matter of fact, they were——

Mr. Kiendl: Cuban corporations.

Mr. Bauman: (Continuing)—three of the four Cuban corporations that Alprin formed, and he broke this check up, although theoretically he was holding it pursuant to Klein's direction and could do nothing with it, he was an escrowee, according to his own statement. He broke this $264,000 up into three smaller amounts and hid it—this is the Government's view—hid it in three different corporate Spanish names.

The Court: They were Cuban. Valverde formed them.

Mr. Bauman: That is correct. In addition, you may ask, what is the reason, what inference could a jury draw. Alprin had in mind when he did this thing? [5954] And I say that the jury could draw the reason that Mr. Roer expressed, the jury could draw the reason that Mr. Roer inferred, that Mr. Klein was having trouble, he was having a quote little trouble with his income tax and he wanted those drafts held until he gave him the word. That is a reasonable inference for this jury to draw, that is a reasonable inference for the jury to draw when Mr. Haas held $35,000 in a bank in Canada under a corporate name, Commerciale la Ribera.

And how did Mr. Haas get that corporation. By the simple expedient of H. H. Klein saying to the defendant Roer, "Give Haas one of your corporations," and it was done.

The Court: He did give it to him; he sold it to him. (Laughter.)

Mr. Bauman: To that extent and only to that extent were Mr. Klein's instructions disregarded.

In any event La Ribera beyond question was incorporated by Roer, by Valverde for Roer or in Valverde's name, and we will come to that because I think the circumstances of the incorporation, your Honor, are properly before the jury and properly before the Court on this motion. But certainly with relation to the fifth count and this $35,000 as to Haas, the $264,000, [5955] two drafts which Alprin held, $272,000 to Roer, I cannot—I just feel so strongly I was going to say I cannot conceive how anyone can say that a jury couldn't say that this was done as a means of frustrating the Internal Revenue Service, the Treasury Department, in the collection of its revenues, as a means of impeding them, as a means of slowing them down, of interfering with them. And there is more that bears on that fifth count.

Mr. Rokoff, sitting up in the hotel room, rewrote the books of the Tivoli Trading Company, by his own admission, in 1947, that bears on that count.

The fact that Mr. Klein took between the dates charged in the fifth count and the present millions upon millions of dollars out of this country, after the termination of the whiskey deal, might well be regarded by twelve jurors as an attempt to frustrate the United States in the collection of its revenues, when they consider the circumstances under which he did it, namely, that a Government representative came to the bank and asked to see his records, and he told that banker, Mr. Holahan, "Don't show the records, and move my money up to Canada." Those are the circumstances under which that money moved there.

[5956] And that is why I say, sir, that certainly under the fifth count, as to the defendants charged, there is the strongest kind of evidence presently in the record against each of the defendants so charged.

The Court: Of course, keeping in mind that they are charged with a conspiracy and with no substantive count. Now, that may sound like an anomaly, and of course the Government is limited because of the fact that 371, which is the basis of the fifth count, of Title 18, if I correctly understand it, speaks only of a conspiracy to defraud. Whether there is a statute that makes it a substantive crime to defraud, regardless of the conspiracy, whether such statute exists I don't know, but in any event it is not presented here.

Mr. Bauman: It is not before the Court, nor was the grand jury under any obligation——

The Court: The reason I am pointing it out, your last statement, and it isn't an easy one, Mr. Bauman, your last statement was that the jury might infer that Klein intended to defraud by taking this money out of the country to impede, regardless—and I think the crime is committed if there is an intention to defraud that is proven—regardless of whether it in [5957] fact does lull the Government or frustrate the Government, I don't think that the Government has to establish that the deal succeeded. But what does concern me is your last statement where you said that Klein's taking the money out of the country might be reasonably found by a jury to constitute fraud or an intention to defraud the Government.

Mr. Bauman: Oh, I see your Honor's point very clearly.

The Court: The point is that the fifth count is framed on the basis of 371, which requires more than the action of merely one man.

Mr. Bauman: Exactly. And I say that——

The Court: All right.

Mr. Bauman: And I see your point, and I think your Honor is entirely right. However, I only submit that, and perhaps I stated it inartfully—what I meant to say is that is one act from which the jury may conclude that such a conspiracy existed and was in furtherance of that conspiracy. And if I said anything to the contrary, it was inadvertent. I think your statement is entirely correct, your Honor.

Now I say as to that fifth count, and I shant attempt to specify the evidence here, although we shall [5958] in our memorandum, the fact that Mr. Haas—that that book of Regan Potter, that rewritten book of Regan Potter, I say, because it is clear from the trial balances and Rokoff's testimony that that book of Regan Potter had to be rewritten or those trial balances which he said he made could not have been made. Now in that rewritten book of Regan Potter, in the exact amount of the part that was rewritten and bearing upon that very transaction of the accounts receivable and the commissions payable, it is clear, or at least the jury could determine from Miss Bennett's testimony, that that entry was made in the office of Maurice Haas by that girl who worked for Maurice Haas, on her statement that it was her best recollection that Maurice Haas told her to do it.

And this, sir, is another circumstance, of which there are many, and I don't want to labor this point because I do

think the fifth count is abundantly clear that as to that count there can really be no question that the Government has established enough, given the benefit of every inference, to go to the jury.

[5959] Will your Honor bear with me just one moment, please?

The Court: Certainly.

Mr. Bauman: I think it is clear from the record that so far as the allocations of whiskey were concerned, and the jury would be warranted in drawing this inference, that allocations of whiskey were made by Hyman Klein, they were made by Hyman Klein in Baltimore, they were made by Hyman Klein perhaps as a result of conversation with his brother at the distillery, one of the other co-conspirators charged in the indictment, but certainly they were made by him in no small part; they were handed to Mr. Koerner at Williams. I say at Williams. That is very much in issue in this part of the case. They were handed to Mr. Koerner and they were followed by Mr. Koerner.

And there, again, you have another instance of the pipeline nature of Williams' participation in this case.

I don't remember, with one possible exception, any one of these wholesalers who testified, that Koerner had ever mentioned Agencias or Ramsey Scott to them. I do have a recollection that one of the wholesalers [5960] mentioned, "What does that S. A. mean on the bottle?" Or "What does S. A. mean" on a certain document. At which time Koerner said, words to the effect, "Well, it doesn't make any difference what it is." But never once, sir, to my recollection at least, did Koerner so much as mention the

existence of what the defense counsel would like you to believe was the supplier of this very important contract which Mr. Jacobs took up with the director of his company.

And the reason I say that is of particular significance and the reason that Roer's actions are of particular significance is that these two men worked with this deal every day of the year during its existence. And their actions, sir, Koerner's particularly and Roer's likewise, to somewhat a lesser degree because he didn't talk as much as Koerner did, conclusively established that they looked for performance to the distillery and that to them Agencias Destiladores was just a name, exactly as the Government contends in this case.

I was looking for a photostat that I had brought up with me but I must have misplaced it. This is it.

[5961] (To Mr. Lumbard) Thank you very much, sir.

Government's Exhibit 52 in evidence, a letter dated August 20, 1946 from Brunswig Beverages, in which Mr. Case, whom your Honor will remember as a witness, talked about, "We are attaching a copy of a letter which we wrote to Mr. Klein requesting additional allocation of Harwood." And then penmanship expert, Mr. Koerner, whose only rival in this case perhaps is Mr. Rokoff, wrote on the bottom of this, "This is evidence"—what a delightful choice of words—"This is evidence that some people know that H. H. and not R. C. W. is making allocations."

Now that, it is stipulated, is Koerner's handwriting and that, sir, on the question of allocations it seems to me

to take from the case any real question as to who was making the allocations. Certainly Koerner understood, and he was the man who made this deal and was in charge of it, that H. H. and not R. C. W. was making allocations.

Roer told Berlowitz that he was a representative of the Harwood Company or Duncan Harwood Company of Vancouver, pages 1791 to 94 of the record. Koerner told Menzies that he had no control over this Harwood situation at all. He told the same thing [5962] to Abrams, in effect.

Now I would like for one moment to return to Koerner's statement. Koerner said in that statement, as I may have said here, that he never discussed with any of his superiors at Williams the appointment of any of these distributors who made a million dollars out of this in commissions. It is clear from the record, too, that, showing tax awareness of the defendant Koerner, it is beyond question in this record that Irving Koerner went to Jacobs to see whether or not he could get Jacobs' permission to pay Roer's commissions to a corporation. On that occasion Jacobs told Mr. Koerner what he conceived the difference between tax evasion and tax avoidance to be and told Mr. Koerner at that time that this was something in which he would not permit R. C. Williams to become involved.

And the Al Roer corporate set-up, while the corporations may have been formed, never really came into operation. I said in my opening that there were approximately 40 corporations involved in this case. I must say now that I think one way or another there were many more than 40, but the ones that we are particularly interested in for purposes [5963] of this discussion are the Cuban and Pana-

anian corporations, and I shall get to those in just one oment, sir, because I think that is the other facet of this gument.

1. Was R. C. Williams anything more than a pipeline r the benefit of Hyman Klein? And I am about through ith that.

2. Did the Cuban and Panamanian corporations do ything more—do anything more—than open bank accounts and pocket money for Hyman Klein and his associates? Did they serve, in other words, as I concede the st of the case to be as Judge Weinfeld stated in his harge in the Bruswitz—did these corporations have a usiness purpose? Because if they did not have a business urpose then I think counsel for the defendant Klein grees, as appears from his brief, that they are not recogizable for tax purposes and the case should of course go the jury. In everyone of those cases cited by Mr. Kiendl e quotes the language which refers to the business purpose, nd the Courts have repeatedly said that, and what we are rying to prove and what we have tried to prove over this eriod is that these corporations or many of them, if your lonor [5964] takes a contrary view with relation to gencias and Ramsey Scott, or many of them had no busiess purpose.

One last word about Koerner's statement and then I hall pass on to the corporate problem.

Koerner said that Klein was acting on behalf of UDL r Duncan Harwood. That is how much of an entity gencias Destiladores and Ramsey Scott were to Irving

Koerner. When he was asked whether he considered that H. H. Klein was acting on behalf of Agencias or Ramsey, Koerner said he didn't know.

Now I should like to pass into the problem of the corporations, and it seems to me that that problem breaks itself down into three parts: Agencias and Ramsey, the Panamanian corporations, Cuban corporations other than Agencias and Ramsey, and that latter category breaks itself down into a further group with relation to Seaboard, Waldorf, Regan Potter and Tivoli which, for reasons I shall explain, are in my judgment a class unto themselves.

Now, if there is any colorability to the argument that has been made by the defense, it rests on the mass of paper that was prepared in the name of Agencias. And I suggest, sir, that the circum- [5965] stances under which that paper was prepared shows that it was nothing more than paper, that every single paper that was prepared had as its object one of two purposes: One, to enable Mr. Klein through these corporations to get the money into his corporate pockets or, two, to write minutes and resolutions, under very peculiar circumstances and at times unknown and, indeed, beyond our power to speculate, to substantiate the claim that he makes now.

You have a situation where Dr. Moran, the president of Ramsey Scott, the president of Ramsey Scott, did not know what business it was in, beyond saying that he knew that this company and other companies of this group of corporations were in the liquor business. I have a recollection of having asked him, "Dr. Moran, do you remember the name of the whiskey that was sold?" And my recollection is that he didn't.

But Dr. Moran is a very unusual man, with his ability recognize paper clips and certain other differences existg in his own mind, like differentiating between "an iginal" and "the original," which I don't think this Court jury [5966] will fail to distinguish between. I gather at what he meant when he referred to an original is that simply meant that it was a ribbon copy obviously preared at some time other than the time when the original as prepared.

And in this 30-odd million dollar business, of which e of the two most important corporate facades was Ramsey cott, the president of Ramsey Scott said, and I am referng to page 1845 of the record, "Details of the business I as not familiar with at all because these corporations ere handled in my office by another lawyer," the late nrique de Cubas, who at the time, who was running Klein's million dollar empire, was a genius of 22, and I say this ith no disrespect to the memory of the boy—I didn't know m—but I submit, sir, that it defies reason to conceive that Ir. Hyman H. Klein or any other person would entrust e affairs of a 30 million dollar business to a 22-year d boy.

The Court: Well, the British Empire entrusted its fairs to a 21-year old Prime Minister named Pitt.

Mr. Bauman: Once in its history.

The Court: Well, it did pretty well during [5967] at time.

Mr. Bauman: Perhaps Enrique de Cubas was the William Pitt of the liquor industry, I don't know. I do now that he drew a lot of corporate papers, sir, and I do

know that that is all he did, resolution after resolution. What was this so-called mass of evidence that was introduced on cross-examination of Dr. Moran by Mr. Kiendl? It was nothing but bank resolution after bank resolution, which every lawyer knows is a matter of form which you must prepare in order to be able to manipulate a corporate bank account. That is what Enrique de Cubas did.

And what were those offices that these corporations maintained in Cuba? A place that was occupied by Ellis Rosenberg on eight or ten occasions when he happened to be in Cuba. But throughout the rest of the two and a half years were occupied by one of the lawyers employed by Dr. Moran, an office on which there were some names on the door, he didn't remember which names were on the door, but the only time anybody could see that door, your Honor will remember, was when the elevator broke down and the staircase was opened, otherwise those names were [5968] not visible to view and were not seen by anybody, nor could they be.

Now what were the circumstances of the preparing of these resolutions, the bank resolutions, the minutes? Dr. Moran said, pages 1860 to 1862:

> "Much as I may be embarrassed to admit, we did not, in our office, at that time, at least, adhere strictly to the orthodoxy of holding the physical meeting."

De Cubas would draw up the minutes and sign them as he saw fit.

Now are these the attributes of corporate operation, are these the attributes of corporate operation that Mr.

Kiendl is referring to in the mass of correspondence, when these very minutes on which he relies and which he parades to the Court and jury at every occasion were written up under the circumstances told by Dr. Moran at page 1860 of the record? I submit that this jury can come to the conclusion that Enrique de Cubas sat down and wrote minutes as he was told to do by Ellis Rosenberg and that no meetings were ever held because Dr. Moran in effect says no meetings were ever held.

And as to those resolutions, sir, this [5969] morning I referred to Mr. Meagher in asking him for this exhibit as one of my favorite Klein exhibits, it is Klein's AW, and your Honor will remember that it consists of a number of papers which are various commercial invoices, copies of, I believe them to be copies of the consular invoices—in any event, it has a memorandum, the former bill of lading, and an envelope bearing Canadian stamps addressed to Agencias S. A., Aguiar 411 in Havana, and near the bottom of the paper is this memorandum to Mr. Ellis Rosenberg, "Re John Dunbar," and it is signed by—I think Mr. Moran identified Dr. de Cubas' signature on that, although as I remembered it, he identified a signature as Dr. de Cubas on a letter that obviously had been written five months after de Cubas had died. However, let us assume that this is de Cubas' signature. And what you have is a letter, to Ellis Rosenberg which quite obviously was sent, because there is no indication that Ellis Rosenberg was at any place, with the exception of Cuba, other than Baltimore, which was there given to him in Baltimore if he was down there at this early time, July 8, 1944, or given to him in Cuba or sent to him [5970] in Baltimore, sir.

The Court: Well, with one exception, and I don't think it is important, there were letters from Klein to Rosenberg when Rosenberg was in Miami.

Mr. Bauman: Yes, sir. What I meant to say was that there is no indication that he was at Vancouver, to my recollection.

Now this letter goes to Rosenberg. And, as your Honor may remember it, what it is is a draft, and I would like to hand it up to the Court, if I may, it is a draft of certain of the resolutions of the type theoretically prepared in the office of the Havana law firm; and your Honor can see in looking at that exhibit that it has been penciled over and corrected obviously by the person to whom it was sent, Ellis Rosenberg, a lawyer, and it next turns up, your Honor, in a letter bearing Canadian stamps sent from the distillery to Agencias Destiladores in Havana, Cuba.

So I submit that, even in connection with these resolutions, so far as any activities in Cuba are concerned, the Cuban law firm was again a form of puppet for the operation of Hyman Klein and his [5971] lieutenants.

Now what have you got as to the operation of Agencias Destiladores and Ramsey Scott in this country? You have got the fact that about the only time anybody in the whiskey business ever saw their name was as a name on certain shipping documents. You have got the fact that as to Agencias and Ramsey Scott, Koerner, if he did remember the name at all of Agencias, obviously did not remember the name of Ramsey Scott or it meant nothing to him, he looked to the distillery for the performance of this Harwood deal.

So far as Koerner was concerned, Koerner recognized that Agencias and Ramsey Scott were shells, were nothing, that Klein was the mouthpiece of the distillery. And who should know better than Irving Koerner? What dealt more closely with this than Koerner did? Who should know better than Mr. Roer, who said he was representing not R. C. Williams, not Agencias Destiladores but UDL or Duncan Harwood. Who should know better than the people in the whiskey business who bought this stuff, who never heard of it other than as a name on shipping papers, who never [5972] once, when they went to see Hyman Klein about getting their allocations increased, your Honor, once had Klein say to them:

> "Well, this is a matter for Agencias Destiladores or Ramsey Scott or any one of these corporations."

Nor did they ever get any correspondence from Mr. Klein, with the exception of shipping documents, that reflected that name.

[5973] I have never seen the books of Agencias Destiladores. Mr. Rokoff says these books were sent down to Cuba. There is not the slightest indication that anybody in the Revenue Service has ever seen that that corporation kept books, because as when Mr. Kiendl pointed out yesterday books were indeed turned over to the authorities in Canada, the books of Agencias was not among them. And even if it were, your Honor, I respectfully submit that under the circumstances to which the witness Rokoff testified, they are entitled to no credit for the purpose of proving that this corporation was conducting a legitimate business,

because Mr. Rokoff wrote and rewrote pages of all the books he ever kept. And this perfectly silly explanation that he gave that he was a very neat man and sometime an erasure would go through a page and that offended his sense of neatness, or on other occasions—and your Honor will pardon me; I just find it difficult to talk about it without smiling——

The Court: That's all right, let the record show that I am smiling, too.

[5974] Mr. Bauman: On other occasions the page number on a page in a ledger would break off and Mr. Rokoff would thereupon feel impelled to rewrite the pages of books. I say that is a perfectly ridiculous story. And it is even more ridiculous when your Honor looks at the books because there are page after page of crossing out and other changes, and I gather that his sense of neatness was a fleeting thing that came and went.

But as to some of these corporations there aren't even such so-called memorandum records, and nobody that I know of has ever seen the Cuban records with the possible exception of William Rokoff and he was so evasive that I couldn't decide when he was all through whether he had said that he had definitely remembered seeing them in Canada or whether he said that he wasn't so sure that he might have seen them in Canada.

The Court: Well, he said that he vaguely remembered seeing them after Mr. Rosenberg refreshed him on it.

Mr. Bauman: Now in that state of the record I would say that your Honor could conclude as a jury could conclude that there were indeed no Cuban books of these corporations.

[5975] If the one person who claims to have sat in the hotel room in Canada conforming books has to be reminded for three days that such books were in existence after he made an affidavit, then I say that the jury could conclude that there were no such books.

Mr. Kiendl's examination or cross-examination that it took Rosenberg three days to get——

The Court: Now just a minute. Not that it is too important, but you see, to keep it straight, he wasn't reminded after he made an affidavit. He was reminded after he made a statement and then he made an affidavit after he was reminded.

Mr. Bauman: You are entirely correct, sir, the statement, however, being under oath.

The Court: Oh, yes.

Mr. Bauman: And Mr. Kiendl's cross-examination evidently designed to show that it took three days for Ellis Rosenberg to talk Rokoff into making that second affidavit is quite correct. Rokoff had sworn to that first statement. He wasn't about just to dash off another affidavit to the exact contrary merely because Ellis Rosenberg told him to do it, because if anything unpleasant came out of that situation it would be William Rokoff in trouble and not Ellis Rosenberg.

[5976] Now what you have in the case of Agencias and Ramsey Scott as the record stands is the fact that a great deal of whiskey was sold by UDL—by UDL to this group of four at $8.05 a case and was sold by them—was sold by them at $19.05 a case, billed through Agencias Destiladores and Ramsey Scott.

I haven't heard of any employees of Ramsey Scott or Agencias Destiladores. Those lawyers down in Cuba did legal work. They were in no sense of the word employees of Agencias Destiladores. They were hired to create a corporation—a corporation, 17 corporations, between which Klein could hide; and they did that.

And when the time came—and this is why I put Valverde on the stand; not to pile evidence on—about the formation of these twelve corporations; but because of the way in which this was done. De Cubas doesn't want to form the twelve corporations for these people. On the contrary, he takes these three defendants over to Valverde and asks Valverde if he will incorporate twelve corporations in effect, sir, in his name. The corporation papers aren't drawn up by Valverde. They are drawn in Moran's office and apparently pursuant to de Cubas' instructions. And [5977] when they are drawn Valverde appears before a notary and solemnly attests, or whatever they do in the Republic of Cuba, that he formed these corporations. And it is that, sir, that I had in mind in my opening when I said that Roer, Alprin and Koerner deliberately were not permitted to use the very lawyers Hyman Klein used in the formation of his 17 corporations.

I have failed to see, your Honor, what it was that Agencias Destiladores or Ramsey Scott did beyond the issuing of such papers as permitted Hyman Klein through his agents Rokoff and Silver to get his hands on the money. And that is the sort of language to which Judge Weinfeld has referred. Whether Klein did it himself or whether he had somebody do it for him, I think we can all agree is a

relatively insignificant matter. But as nearly as I can see in the Agencias situation there wasn't an office in this country, there weren't any employees in this country, there was nothing by Hyman Klein and a bunch of bank accounts. William Rokoff sitting in a room in Baltimore, sometimes at night at home, sometimes in the office of H. Harvey & Company, typing furiously. I can see the picture of it now. A bill from Douglas Ryan to Agencias Destiladores.

[5978] Well, let's take Auld Malcolm. A bill from the Panamanian corporation to the Cuban corporation.

The Court: Well no, first he would get it from Peter Malcolm.

Mr. Bauman: Well, he *received* that one.

The Court: Yes.

Mr. Bauman: I am just talking about his activities.

A bill from the Panamanian corporation to the Cuban corporation. A bill from the Cuban corporation to H. Harvey & Company. And a bill from H. Harvey & Company to the person who is ultimately buying.

That typewriter must have sounded like a machine-gun while he was typing three invoices at a time to create the impression, your Honor, that business was being conducted in these Spanish names.

Now let us pass on to Douglas Ryan, because I think that Douglas Ryan is typical of the Panamanian corporations that were interposed between the Cuban corporations and United Distillers.

Your Honor heard Harry Heath Allen, who was the resident agent and manager who said this corporation was formed, and that is the first and last he ever heard of it:

and you also heard Mr. Kiendl's cross-examination [5979] which was to the effect, "Well, didn't you know, Mr. Allen, that it was never intended that these corporations would do any business in Panama?"

Well, I am willing to accept that because the corporations obviously never did any business in Panama.

So that narrows the question to: So where did they do business? And I say there isn't a word in this record showing that Douglas Ryan, which picked up the difference, your Honor, between $8.05 and $18.75, the bulk of the income in this case—there isn't a word of proof, there isn't a suggestion in the record that Douglas Ryan was anything more than a name on a billhead, and if your Honor please, no one has ever seen one of those Douglas Ryan billheads.

The Court: What about Government's 404, Mr. Green's summary, where he sets forth in column 7 of the columns headed by the names of companies the withdrawals by Douglas Ryan and payment of those named in the first column? And it looks to me like a very active account aggregating in total $1,056,641.15.

Mr. Bauman: (To defense counsel) May I borrow one of those, please? We are working on a memorandum downstairs——

The Court: True, a good many of them were [5980] so-called intercompany transactions because they are noted as such, but at least the first two indicate the payment to Dunan Harwood of three thousand.

Mr. Bauman: $3,000.

The Court: —and a payment to John Dunbar of $114,000.

Mr. Bauman: John Dunbar is another one of those corporations, your Honor.

The Court: No; John Dunbar of Canada. It is the characterization that your man put on it, if you look at it under the words "Paid to", the second line, "John Dunbar, Canada." I take it that's a source.

Now Douglas Ryan paid John Dunbar of Canada $114,000. Of course we also know from your man's analysis that a substantial part, if not all, of the Financiera Lloyds payment of close on to five million dollars to Duncan Harwood was for deliveries made to Douglas Ryan, if I correctly remember the testimony. I may be mistaken about that.

Mr. Bauman: Your Honor is right. Mr. Kiendl asked the question, I remember.

The Court: And Mr. Green made the answer.

Mr. Bauman: Mr. Green didn't agree with Mr. Kiendl's question that it was the fiscal agent.

[5981] The Court: Oh, that is where we get into the business about whether he knew that Financiera Lloyds completely owned Douglas Ryan, and I told him to go back and look at the statements to find out whether he ever took the trouble to ask. Isn't that that situation?

Mr. Bauman: It is, sir, but the fact of the matter is, if anything, it was exactly the opposite.

And again there is no proof in this record that Financiera Lloyds owned Douglas Ryan or that Douglas Ryan owned Financiera Lloyds.

Now to come back to Douglas Ryan you have in this corporation, sir, perhaps a little less than you do in some of the others. You have some money passing through. I don't think it is as much as some of the other Panamanian corporations where the amounts ran into the millions. Actually you have a relatively small—and I mean relatively small in this case where we have come to talk of $117,000 as a relatively small amount—which apparently found its way to Canadian companies.

But again, sir, the jury could reasonably find that a corporation organized to do nothing but hold money which made, which wrote checks in the amount [5982] your Honor has indicated, existed for no valid corporate business purpose.

Now it was curious to me in reading Mr. Kiendl's brief last evening that in talking about his claim of alleged validity of these corporations he talks at considerable length about the Cuban corporations and then in one grand stroke of the pen dismissing the existence of the Panamanian corporations which in fact, sir, in the Harwood deal held all but 30 cents of the profits. And it isn't enough, your Honor, it isn't enough to say that if Agencias and Ramsey were valid then all the other corporations were valid because this one comes before Agencias and Ramsey.

The Court: Well, if Agencias and Ramsey and Douglas Ryan and Financiera Lloyds and Cameron Stuart and Angus Kirby of Panama did business then in so far as the first four counts are concerned, will you explain to me how any corporation beyond them, whether it did business or not, becomes important?

Mr. Bauman: I will be happy to, your Honor.

The Court: I would like that.

Mr. Bauman: Because that leads me right into discussion of Seaboard, Waldorf, Regan Potter and Tivoli.

The Court: Exactly.

[5983] Mr. Bauman: I think I can put it very shortly to your Honor by giving you an example.

If I make a certain amount of money in a perfectly legitimate corporation, and I decide that I want to——

The Court: Well, let me interrupt and ask you what you mean by perfectly legitimate corporation? Is it a one-man corporation?

Mr. Bauman: Yes.

The Court: And you do everything that the corporation has to have done? In other words, let's say you are an automobile mechanic.

Mr. Bauman: All right.

The Court: And you open up a repair shop. You do all your own bookkeeping, you do all your own repairing, run around in your car and buy your supplies and everything.

Mr. Bauman: I actually pump gas.

The Court: Yes, and you set up a corporation. Now the Supreme Court has recognized that those situations flourish by the millions literally in this country, and they have dummy directors and they hold so-called meetings that are merely the typing up of something. Now you do everything—you repair the cars, you send out the bills, [5984] you do the collecting—you do everything.

Now if your rationale is correct—and now first let me ask you, is that a legitimate corporation?

Mr. Bauman: Surely.

The Court: All right.

Now, if your reasoning is correct then we ought to take all those one-man corporations for tax purposes and throw them in the garbage.

Mr. Bauman: No, no, Judge; I haven't suggested that for one minute.

The Court: Well, they operate all through one man.

Mr. Bauman: Well, that isn't what equates them for failure to be recognized for income tax purposes. That isn't the point that I am making at all.

The Court: Now remember, I am talking about a different situation. Now on the other hand we have got the contrary of that which was proposed by Bruswitz.

Mr. Bauman: I say to you, Judge, that whether or not one man is in a corporation or more men are in a corporation is a matter of indifference.

The Court: All right. Now, we are agreed on that.

Now let's get back to your hypothesis. I [5085] just wanted to understand what you meant by a legitimate corporation. The hypothesis I pointed out to you, the mechanic hypothesis——

Mr. Bauman: It was legitimate for all purposes.

The Court: All right. Go on from there.

Mr. Bauman: Now I conduct that business and I do all these things as you say, and maybe I do a little better than the next fellow and I make a great deal of money, and I don't draw this money out while I am making it; I let it accumulate there and I pay my personal income taxes and I pay my corporate income taxes, and I don't urge any im-

portant distinction, although it might well be considered. But I do whatever I am required to do, and then the time comes when I transfer that money from the Bauman Garage Company to the Bauman Profit Holding Company—and that is what I submit Regan Potter, Waldorf, Tivoli are.

The Court: Now may I inject a question? Whose money did the Bauman Profit Holding Corporation get? Did it get Arnold Bauman's money or did it get the money of the Bauman Garage?

Mr. Bauman: It got Arnold Bauman's money.

The Court: Well then I am afraid that is [5986] where you and I come to a parting of the ways, because then you are flying in the face of your concession that the one-man corporation that I pointed out to you is valid for all purposes. And the only way that you can say that the Bauman Profit Holding Corporation got money other than the Bauman Garage Corporation is to say that for tax purposes the Bauman Garage Corporation is invalid.

Mr. Bauman: But, Judge, the difference between these two types of corporations is that one of them has a business purpose.

The Court: Now, look: You did agree that up to the time you formed the Bauman Profit Holding Corporation that the money in the Bauman Garage Corporation was the money of the Bauman Garage Corporation.

Mr. Bauman: Absolutely.

The Court: Now I simply ask you that when the Bauman Garage Corporation transferred that money to the Bauman Profit Holding Corporation whose money was transferred? And you tell me not the Bauman Garage's

money but Arnold Bauman's money. And I say to you you can't carry water on two shoulders.

Mr. Bauman: The difference is, your Honor, as I see it, that I as Arnold Bauman have an election to make when that money is in the Bauman Garage Company. [5987] That money can sit there or I can disburse it.

Now if it is disbursed I say that I cannot disburse it to a corporation that has no purpose other than to hold it for six months so that I can declare it as a capital gain. I say if that is my purpose that for tax purposes that money is taxable to me.

The Court: But, Mr. Bauman, let's get it back into course of years now. Let us say that the Bauman Garage Corporation kept that money intact for the years 1944, 1945 and 1946, and that you had income during those years and you filed your return and paid your tax. And let us even say that part of that income was the drawings that you took from the Bauman Garage Company and you paid your tax. That was the question I asked Mr. Green and he gave us the answer.

Parenthetically I thought defendants' counsel would drop dead when I asked the question, but I asked it anyway. (Laughter.)

Mr. Kiendl: I almost had a heart attack, your Honor.

The Court: But my job here is to find out what the truth is.

In any event the Bauman Garage Corporation in 1944, 1945 and 1946 paid Arnold Bauman some money, and [5988] he filed his return in '44, '45 and '46 and he paid his

taxes on that, and his other income. No argument about that.

Now, so long as that money remains in the coffers of Bauman Garage you will agree that Arnold Bauman personally is not liable for any income tax on any of the income of Bauman Garage Corporation?

Mr. Bauman: Certainly, Judge.

The Court: All right.

Now, if Arnold Bauman is not liable in 1944, 1945 or 1946 for that money, thereafter, he having filed his return for those years, on what theory can liability be assessed against Arnold Bauman by virtue of anything that Bauman Garage Corporation may do with that money thereafter?

My own notion is that the doing-business aspect of this case comes into play only with respect to the corporations that had direct dealings with Canada, and I have named them. They were given to me by your own witness when I indicated that I was not satisfied with total figures; I wanted it broken down to the penny. And those corporations were Agencias Destiladores, Financiera Lloyds, Douglas Ryan, Cameron Stuart, Angus Kirby of Panama. I believe [5989] those are the only ones. And I cannot, and I would very much appreciate if you could indicate to me persuasively, how whatever happened to that money beyond those five companies has any bearing on the first four counts of this indictment.

Mr. Bauman: Well, what your Honor has asked me to do is to assume that these corporations are valid.

The Court: Yes, yes.

Mr. Bauman: And that isn't what I have been trying to do for the last two hours. I have been trying to persuade you that they are not.

The Court: No, you are trying to escape my question, Mr. Bauman.

Mr. Bauman: No; I will answer your question.

The Court: You will try.

Mr. Bauman: All right.

The Court: We have agreed that one of the issues is the validity of the business functions, or the existence of business functions by Agencias Destiladores and Ramsey Scott. And then you came in your argument to the point that Mr. Kiendl brushed aside all the rest with a flourish.

Mr. Bauman: I talked about the Panamanian corporations:

[5990] The Court: Exactly.

Mr. Bauman: That is right.

The Court: Now then I go further, and I say, taking these five companies who had their direct dealings with Canada, and I will say to you very candidly and to everybody within earshot that if I am satisfied that a reasonable person could find other than that these five companies were doing business, that I would deny the motion for judgment of acquittal.

But then you go on beyond that.

Now I say to you in going to that beyond area, assuming I am satisfied that a reasonable person would say that these five—I pry into the mind of that robot that we manufacture here for that purpose, that composite man who

knows all the answers, and I ask him and he says, "Those five, they did business."

Mr. Bauman: I would say to your Honor's question——

The Court: Then I come to the next question—and let me finish my thought—then I come to the next question and I say, "Now, Mr. Bauman, if those five did business on Klein's liability for 1944, 1945 and 1946, and a conspiracy in connection therewith, what difference does it make whether the ones beyond those [5091] five did business or not?"

Mr. Bauman: Fine, and I will answer you directly.

The Court: All right.

Mr. Bauman: Starting with the assumption of these corporations, the Bauman Garage or their equivalent, was valid.

The Court: Yes.

Mr. Bauman: Returns are filed for 1944, 1945 and 1946 by Arnold Bauman. Let's say 1944 and 1945, because the money is sitting in Bauman's Garage during that period.

Now I say to your Honor that under those circumstances it would appear to me, assuming the validity of the corporation, that I would not be chargeable with income tax evasion for later transferring the property of Bauman Garage in another year. And of course the crux of our argument here is whether or not the equivalent of Bauman Garage is valid in this case.

The Court: Oh, we have gone by that. Let's not get back to that again.

Mr. Bauman: Now let's get to 1946.

The Court: Let's not get into that hypothesis [5992] because your indictment doesn't charge that. Your indictment charges that by the filing of a return in 1948 for the year 1947 there was an evasion in 1944, 1945 and 1946.

Mr. Bauman: Yes.

The Court: And that there was a conspiracy to evade in 1944 and 1945 and 1946.

Mr. Bauman: The only circumstance, your Honor, under which I can see a charge of tax evasion on the hypothesis you have given me would be if Bauman Garage transferred to Bauman Profit Holding within one of the taxable years, and at that time—at that time and in that amount, your Honor, I would say that at the time of the transfer from the valid to the invalid corporation that was the personal income of Arnold Bauman during that year. But as to those years before that, I would say that Arnold Bauman would not be guilty of tax evasion based upon my later act.

The Court: Well, you have given me an answer and I happen to agree with your answer.

Mr. Bauman: I have tried to answer you directly, sir, on this.

The Court: You have.

Mr. Bauman: Fine.

[5993] The Court: You have answered me very candidly.

Now would you be more comfortable if we suspended and had lunch and came back, or would you——

Mr. Bauman: Well, let me see just a moment.

The Court: I leave it entirely at your choice.

Government's Argument in Opposition to Motions for Judgment of Acquittal

Mr. Bauman: Thank you, sir.

Mr. Kiendl has indicated a preference to get away if he can.

Mr. Kiendl: (After a pause) Mr. Bauman, it wouldn't inconvenience me too seriously if we had lunch.

Mr. Bauman: I would appreciate it if I had another half an hour.

The Court: Yes, I think you are entitled to it. You have been going since opening. We will take a luncheon recess until 2.15, gentlemen.

(Recess to 2.15 p.m.)

[5994] AFTERNOON SESSION 2.15 p.m.

Mr. Bauman: Your Honor, there are one or two remaining points that I would like to make, one or two remaining facts which I would like to call to the Court's attention.

It seems to me in the entire manner in which this operation was handled by the defendant Klein and by the various individuals who aided and abetted the defendant Klein, there appears very clearly a concerted plan at hiding, at concealing, at secreting their participation in this Harwood whiskey deal. Indeed, an argument can be made from the very multiplication of corporations, the proliferation as they have been called on occasion of these corporations was done for no reason beyond an attempt to conceal and hide the identity of the individuals involved and the nature of their activities in this operation. The very names of the corporations themselves in several instances, corporations of identical names being incorporated in Panama and Cuba, admit of such an inference.

Government's Argument in Opposition to Motions for Judgment of Acquittal

In their dealings with banking institutions you see a perpetuation really of this desire to cover [5995] up, to hide, to conceal, to which I refer. For instance, every single bank with the exception of the bank in Cuba, but of these American and Canadian accounts, was instructed, to the best of my recollection, and I know of no case where the Canadian or American banks were permitted to deal or negotiate with the Cuban office, each of these banks was instructed to maintain the appearance of Cuban operation, Agencias Destiladores, 411 Aguiar Street, but was not permitted to send the correspondence, was not permitted to send the bank statements, was not permitted to send the resolutions or any article of bank business to that corporation as such.

For instance, I have before me Government's Exhibit 302 which is the New York branch of the Royal Bank of Canada, Regan Potter file, and I mention this not so much for its own sake as I do of being typical of everyone of these files, and they break down into several categories. This one bears a letter signed Regan & Potter Company, Limited, H. H. Klein president, typed by Rokoff on what appears to be a blank sheet of paper, in which they open an account on May 4, 1945 with the deposit of $5300—"Kindly have your Montreal branch acknowledge receipt [5996] of the deposit to us in care of Mr. Ellis Rosenberg, 124 Webster Street, NW, Washington, D. C., U. S. A. Will you please have your Montreal branch forward a checkbook to the same address."

Is that where Regan Potter was holding forth? Is that any scene of the operation of Regan Potter?

Government's Argument in Opposition to Motions for Judgment of Acquittal

In the case of Ramsey Scott, and I am reading from Government's Exhibit 283, which is the Ramsey Scott file of the Royal Bank of Canada, New York branch, and this is typical of many letters—you have seen them in these files one after another—this is on the letterhead of Ramsey Scott, signed by H. H. Klein. One sentence; I would like to read it because this was typical of their entire dealing with the bank. Addressed to Royal Bank of Canada, New York:

> "Dear Sirs: In connection with canceled checks and bank statements which you may have from time to time for this corporation, please accept this as your authority to hold same at your institution pending personal acceptance by one of our officers or representatives during their occasional visits to the United [5997] States."

Signed by H. H. Klein.

Did Mr. Klein mean his occasional visits to the United States? Did he mean the occasional visits of Ellis Rosenberg to the United States? Of Mr. Silver to the United States? Of Mr. Rokoff to the United States? These are the only people who had anything to do with the bank accounts of these corporations.

It is indicative to me and, I respectfully submit, should be to the Court of a desire to conceal, a desire to conceal based upon a purpose, I say, of tax evasion.

The third category of these bank records, Waldorf & Company, No. 316—and this again is just typical; I pick them at random—bears at the top of the bank statement this

legend, and it is on many, "Under no circumstances is any mail to be sent to this company. Advices et cetera are to be handed to Mr. McLoughlin."

I specifically call your Honor's attention to Government's Exhibit 254, which I shall not read to the Court because I am sure the Court is familiar with it. It consists of two letters by Morris Alprin [5998] to Hyman H. Klein, in which the Government suggests or from which the Government suggests this jury can determine properly and reasonably that in laying out the procedures, in drawing the blueprint for this scheme, Morris Alprin was not acting as a lawyer but was acting as a conspirator. Your Honor will find from a reading of that document a play-by-play approach to the entire handling of the Cuban operation, an operation which Mr. Alprin must have known at the time he wrote was never contemplated and one which he must have known very shortly thereafter never took place.

In that letter, for instance, Mr. Alprin suggests how the consular invoices should be made out. And your Honor will remember that among the hundreds and hundreds of consular invoices I have no recollection of any one of those invoices reading from UDL for the account of Duncan Harwood to any of the Panamanian corporations. In other words, those consular invoices by the hundreds were made out UDL for the account of Duncan Harwood or vice versa to R. C. Williams for the account of Agencias Destiladores.

Now on the face of them, or on the face of the transactions that Mr. Kiendl has referred to, if [5999] there was any transaction between the UDL subsidiary and any other

corporation, the transaction was between the UDL subsidiary and the Panamanian company because on the defendants theory in the case the whiskey was sold by the UDL subsidiary to that Panamanian corporation.

And I respectfully submit to the Court that in the manner of preparation of those consular invoices you have still another manifestation, this time by United Distillers, of which Isidor Klein, McLennan and Norgan were important members. Here you have in effect their statement that in their mind for a period of years Douglas Ryan and those similar Panamanian corporations didn't exist.

And so it seems to me you come full circle among the people who dealt in this whiskey, who heard about this whiskey and who were involved in this transaction right down to United Distillers of Canada or United Distillers of Vancouver either being unaware of the existence of Douglas Ryan or ignoring it for what it was—a corporate shell.

Another aspect of Klein's purpose of concealment it seems to me is contained in two letters, and they are Defendant Klein's J, I believe that is, and [6000] Government's Exhibit 18, which your Honor will remember were two letters prepared in Baltimore, and it was stipulated when the FBI expert was seated here that these two letters, one bearing the impression stamp of Ramsey Scott Exportadores and the other one bearing the printed letterhead of Agencias Destiladores, both of these letters dated January 2nd, 1946 and apparently both of them typed by William Rokoff, although Mr. Rokoff at first denied that he had ever done such a thing by the time the cross-examination was through he conceded that he might have typed these

letters, and I think that fairly states the record. But in any event, letters typed showing as the dictator in one case E. C., obviously for Enrique de Cubas who signed the letter; another one bearing the initials of the dictator F. G., Francisco Gurri being the signer of the letter, and both of them showing as the stenographer H. G. Z., Helen Gonzalez Zayas, according to Dr. Moran.

Those letters, it is respectfully submitted, and I can't say how many more of them exist but we do know of two of them, show a purpose of concealment, a purpose I say of tax evasion when read in the light of all the facts in the case going back to the very [6001] opinion letter of Mr. Halperin which we discussed this morning. Each one of these things must be read against the total background of the case. And the Government submits, sir, that this jury can reasonably infer that in so doing, Klein or his co-conspirator Rokoff intended to conceal their business activities with the purpose of tax evasion.

[6001] Added to that, I think everyone will agree that in any case involving income taxes the books and records are of more than ordinary importance, and I rather doubt that anybody will disagree with the statement that the rewriting of books is a highly suspicious circumstance. I do not contend, of course, that standing by itself it is sufficient to prove the crime, but the Government does suggest, your Honor, that it is a circumstance of no small proportion in the trial of an income tax case.

I shall not labor the testimony of the witness Rokoff because your Honor remembers that.

And I respectfully submit, sir, that it is a fair statement that these books were rewritten, in some instances I

say at the direction of the defendant Klein, as appears from the testimony of Rokoff, since [6002] he testified that all of his entries were made pursuant to Klein's direction. And it was clear, and everyone knew and everybody understood, that Klein didn't watch each invoice come across his desk and tell him how to enter it, but what Rokoff said was that Klein told him how to handle these transactions bookkeeping-wise in the routine situation, and in the extraordinary ones like that million and a half dollars which was changed, obviously changed, such instructions came specifically from Hyman Klein. And in that case of the 3 million dollars Mr. Kiendl may be able to sell this jury that 3 million dollars withdrawn and 3 million dollars deposited six weeks later canceled one another out, that it doesn't mean anything. But I respectfully submit, sir, that 12 jurors could come to the conclusion that the elimination from the journal of one of these companies and the total failure of entry on either of the ledgers of these two corporations done at the suggestion of Mr. Klein was an event indicating Klein's criminal intent not only under the fifth count but under the first four counts as well.

Added to that, I think everyone will agree that in any case involving income taxes the books and records are of more than ordinary importance, and I rather doubt that anybody will disagree with the statement that the rewriting of books is a highly suspicious circumstance. I do not contend, of course, that standing by itself it is sufficient to prove the crime, but the Government does suggest, your Honor, that it is a circumstance of no small proportion in the trial of an income tax case.

I shall not labor the testimony of the witness Rokoff because your Honor remembers that.

And I respectfully submit, sir, that it is a fair statement that these books were rewritten, in some instances I say at the direction of the defendant Klein, as appears from the testimony of Rokoff, since [6003] I shall have concluded. The jury may consider, too, the fact that Mr. Klein's income tax returns were prepared in the years 1944, 1945 and 1946 by Mr. Older who testified here. And during that period Mr. Older was never informed of the existence of these Cuban or Panamanian corporations, and that in 1947, when the time came, and the time came, sir, because in 1946 the evidence shows Klein knew that the United States was looking into him, that the United States had trailed some of his money to the Royal Bank of Canada here in New York, and that it was only—one didn't have to be as smart as Mr. Klein is to know that we were one step away then from the very problem which he has today in this court.

Now, that 1947 return was prepared by the defendant Haas. I shall not labor that. I shan't attempt to meet the straw men that Mr. Kiendl set up in his argument. The figures are there, the checks are there. There is no question about that.

The question is, did Klein lie, did Klein wilfully lie when he said that that money, sir, in the 1947 return was received by him as a capital gain? That is the question.

[6004] The checks were drawn. I would be silly to stand up here and attempt to dispute that. The bank records indicate when they were drawn. I don't know whether they

were drawn for 15,000 shares of one or another of these corporations. I don't think it is important. Because the checks paid to him were his share of the Harwood whiskey profits.

But what this jury, I submit, sir, has a right to determine and may find in the light of all his activities about which I have talked for the last two and a half hours, is whether at the time he did that he did it deliberately, wilfully and with a purpose of tax evasion. And all the opinions in the world obtained under the circumstances under which he obtained them, on the half truth and the half fact does not remove that in my judgment, sir, as a question for the jury.

Your Honor, the Government submits that this jury may rationally conclude that Hyman Harvey Klein was guilty of tax evasion for the years 1944, '5 and '6, that there are more than ample facts in the record to support such a conclusion, that in so doing he was aided and abetted by the other defendants [6005] named with him in those counts.

The Government submits that there is ample evidence to support the fourth count of the indictment charging a conspiracy with relation to those years.

Your Honor has agreed, and I think, of course, as your Honor apparently does, that it is beyond question that these triers of the fact must be able to come to such a conclusion rationally, that whatever I may think or Mr. Kiendl may think or, indeed, the Court may think as to the guilt or innocence of the defendants, is on this motion, sir, immaterial. I submit that we have met every test required by the law. And I respectfully urge your Honor to deny the motions made by the defendants.

Government's Argument in Opposition to Motions for Judgment of Acquittal

I have not attempted to argue the law points, I think it would needlessly protract the argument, because I shall answer every single one in the memorandum which will be submitted to your Honor on Saturday noon. And if your Honor wishes to address any specific questions along those lines I shall be happy to answer them, but I am presently, with the Court's permission, reserving that discussion for the Government's memorandum of law.

[6006] The Court: I should like to ask the defendants to elaborate on one point that Mr. Bauman brought out.

As I undestand the law, if the five corporations which were initially billed by the source of supply were in my view to be said or to have conducted business to the extent that a reasonable person could so conclude, then regardless of what transpired as to the intent that brought about the formation of these companies it would appear to me that a motion by the defendants for a judgment of acquittal as to the first four counts would be—it would be in in order for the Court to sustain. But let us get beyond the five companies.

The funds of these five companies were at one time and another transferred to four other companies in various ways and came to rest in the coffers of Waldorf and Seaboard and Tivoli and Regan Potter.

Now can it be said with equal force that a reasonable person would have to conclude that these four companies did business? Because I recognize that there is a much smaller, if any, quantum of indicia of doing business with respect to these four [6007] companies than with the first five, because with the first five you did have billings back

id forth and you did have, at least as to Agencias and amsey Scott, shipping documents exposing them as connected with the transaction.

But on what basis can I say that a reasonable person ould conclude that Regan Potter, Waldorf, Seaboard and ivoli did business sufficiently for my taking this case rom the jury as to the first four counts? I would like to e enlightened upon that.

Mr. Kiendl: If your Honor please, in that connection, n behalf of the defendant Klein, we would like to advise he Court that in our opinion the four companies that your Honor now names, Waldorf, Seaboard, Tivoli, and Regan Potter, those were not in the category of buying and selling ompanies and they have been excluded, and we understand that your Honor reaches the conclusion that a reasonable mind would have to reach the conclusion that the buying and selling companies were actually engaged in some orporate activity for some corporate purpose and doing ome corporate business, and then it would make no difference about these other companies.

[6008] But your Honor goes a step further than that, as I understand it, and asks us what evidence there is to support the proposition that these other four companies, which I will call perhaps inartistically the investment companies or the financing companies, what evidence is there in this record that they actually did some business.

The Court: May I interrupt to point out, Mr. Kiendl, that the reason for my asking that question is because in the opening of his remarks Mr. Bauman posed the proposition

that he thought the issue was that if all or any—and I think I correctly quoted him——

Mr. Kiendl: Yes.

The Court: —of these 17 companies, including all of them, that if all or any of these companies could by a reasonable person be held not to have done business.

Now am I to understand then that your answer is this: That we would then be throwing in the lap of the jury the legal obligation of the Commissioner in a situation of that kind to make allocation under Section 45?

Mr. Kiendl: That would certainly be one of my answers, and your Honor puts it a whole lot better [6009] than I could possibly put it.

But I want to call to your Honor's attention that in building up this mountain of evidence that the Government has introduced here they have put in evidence the bank records and other documents, some of the books of these very companies, showing that they were actually engaged in the business for which they were formed, handling the profits of the companies from whom they received these moneys; and under the decisions of the United States Supreme Court as we read them if they were engaged in any business activity—the question which you addressed to Mr. Bauman and which he did not answer—if they were engaged in any business activity that could be called a business activity that ends it so far as this tax situation is concerned.

And I do want to add just one further word, your Honor: That the income received by those companies—Waldorf, Seaboard, Tivoli and Regan Potter—the moneys received by them are not embraced in this bill of particulars.

Opinion of Court Deciding Motions for Judgment of Acquittal on All Counts

The Court: In the bill of particulars.

Mr. Kiendl: Which excludes all income from all sources except the nature and source of the income that is there set forth, and that is solely and [6010] exclusively, your Honor.

The Court: The five companies.

Mr. Kiendl: The five companies, and the income from the sale of the five different types of whiskey.

The Court: All right, gentlemen, I hope to have this thing resolved so I can give you the answer on Tuesday morning.

We are in adjournment now until Tuesday at 10.30.

(Adjourned to Tuesday, June 28, 1955, at 10.30 o'clock a.m.)

OPINION OF COURT DECIDING MOTIONS FOR JUDGMENT OF ACQUITTAL ON ALL COUNTS

[6011] At the end of the Government's case in the trial of the indictment herein, all defendants moved for judgment of acquittal (F. R. Crim. P. 29(a)) on all counts.

The five count indictment here charges in counts 1, 2 and 3 that, in 1948, defendant Hyman H. Klein filed a federal income tax return which was false in that it treated as a capital gain in 1947 that which was his individual income in 1944, 1945 and 1946; that this constituted an attempt at evasion of Klein's individual income taxes for 1944 (count 1), 1945 [6012] (count 2), and 1946 (count 3) and that the eight remaining defendants in said first three counts aided and abetted Klein in each such attempt.

The indictment here further charges in count 4 that the nine named defendants and two co-conspirators combined to attempt to evade the 1944, 1945 and 1946 individual

income taxes of said Klein and three other defendants, residents of Canada. The fifth count will be discussed later.

If there were the attempt charged in the first three counts to evade, or the conspiracy charged in the fourth count to attempt to evade, they can only be spelled out of a finding that certain foreign corporations were a sham and that the income of those corporations in 1944, 1945 and 1946 was in reality that of the defendants, the evasion of one of whose individual taxes was attempted, as charged in the first three counts, or the evasion of four of whose individual taxes was conspired about, as charged in the fourth count.

The recital most favorable to the Government of the operation of these foreign corporations is substantially as follows:—During 1944, liquor was purchased from a Canadian distiller by Corporation A, [6013] a Cuban corporation. It was shipped directly by the distiller to an American wholesaler who was a customer of an American importer. When the invoice for that purchase was received from the Canadian distiller with the necessary shipping papers in Baltimore, Maryland, in an office of an officer of Corporation A, an employee of that officer would bill the American importer (to whose wholesale customer the shipment had been made) at an increased price. The employee would then present the shipping document at the New York bank of the American importer and collect against an irrevocable letter of credit. Corporation A would then pay the Canadian distiller.

In 1945 and 1946 the operation was different in that a Panamanian corporation, became Corporation A and was injected (apparently to reduce Cuban taxes) between the

distiller and the Cuban corporation so that the transaction then was as follows:—

Liquor was purchased from a Canadian distiller by Corporation A, a Panamanian corporation. It was shipped directly by the distiller to an American wholesaler who was a customer of an American importer. When the invoice for that purchase was received from the Canadian distiller with the necessary shipping [6014] papers in Baltimore, Maryland, in an office of an officer of Corporation A, an employee of that officer would bill Corporation B, a Cuban corporation, at an increased price and would on behalf of Corporation B simultaneously bill the American importer (to whose wholesale customer the shipment had been made) at a further increased price. The employee would then present the shipping documents at the New York bank of the American importer and collect against an irrevocable letter of credit. Corporation B would then pay Corporation A or Corporation D, another Panamanian corporation, its share of the proceeds as represented by its invoice and Corporation A or D would then pay the Canadian distiller the amount of its original invoice. Corporation A and/or B and/or D later transferred the retained share of profit to Corporation C, another Panamanian corporation, where the money remained until the liquidation of Corporation C.

Upon such liquidation in 1947 Hyman Harvey Klein, the principal of Corporation C, resident in the United States (the three others were Canadians) paid a capital gains tax on his liquidated share.

Thereby the Government claims he fraudulently [6015] attempted to evade individual income taxes in 1944, 1945

and 1946 on the profits of the transactions in those years.

If the Cuban and Panamanian corporations were doing business and were not the sham, concealing the joint venture of the United States resident Klein and his three Canadian associates, which the Government claims they were, then the first four counts of the indictment must fall. For, if these corporations were commercial enterprises, their income was not that of Klein and his three Canadian associates and, in the absence of such personal income, no attempt to evade tax thereon as charged in the first three counts and no conspiracy to attempt to evade tax thereon as charged in the fourth count could have occurred.

Upon the argument of the motions for judgments of acquittal it was agreed that the test to be applied is:—"Giving the Government the benefit of all reasonable inferences that might logically flow from the evidence, if a reasonable person could conclude guilt therefrom the motion for judgment of acquittal must be denied and conversely if a reasonable person could not conclude guilt therefrom the motion must be granted."

Such test requires that it be assumed on this [6016] motion that this syndicate was erected by the American resident defendant Klein and his three Canadian associates as a tax maneuver; that a contract with an American importer under which almost half of the whiskey was sold was shaped and supplemented so as to except from United States income tax the profits realized thereunder; that that contract reserved to Klein and his associates dominion over the approval and even selection of salesmen for the American importer and wholesalers to whom it sold and of allocations of the quantities of whiskey to be sold; that in the

erformance of this contract and all other sales into the nited States, defendant Klein, for himself and his asso- iates dictated the policies of the seventeen Panamanian nd Cuban corporations and of the importers insofar as hey concerned this whiskey; and finally that the syndicate nd operations in the United States and elsewhere for the ntire period were scrupulously geared to gain the immu- nity suggested by tax counsel (another defendant—Haas) nder the decision of *East Coast Oil Co., S. A.* (31 B. T. A. 558 (1934) aff'd 85 F. 2d 322, 5 Cir. 1936, cert. den. 299 U. S. 608 and *Ronrico Corp.* (44 B. T. A. 1130 (1941)).

[6017] Under this state of facts the Government contends that the jury could find that the seventeen Cuban and Panamanian Corporations were mere empty shells and a sham or device to escape United States income taxes and that therefore the profits ostensibly of the syndicate were in truth those of Klein and his Canadian joint venturers.

In my view, the Government's position on the first four counts is untenable. On the testimony and exhibits in the case, submission to the jury as an issue the question whether the corporate syndicate above described was an effective shield to the joint venturers against personal income tax liability for the profits of the syndicate in the years when earned would, in effect, have the jury pass on a question of law, namely, whether for tax purposes, any or all of the constituent corporations had an independent personality, "a vexed question at best." (*Harwood* v. *Eaton*, 2 Cir., 68 F. 2d 12, 15; see 44 Yale L. J. 436, et seq. (1935); 10 Tax Law Review, 307 et seq. (1955).

[6018] For purposes of these motions I am satisfied that there is ample evidence in the record to compel the

conclusion that the whiskey selling operations which produced the income were, in practical effect a "joint venture" as characterized by the Government. Yet, the law is abundantly clear that all corporate operations are in a sense a "joint venture." ("A corporation, stripped of its fictitious personality, is an association of persons mutually agreed upon the execution of more or less definitely expressed purposes, publicly registered as the law requires.", *New York Trust Co.* v. *Edwards*, 274 Fed. 952, 955.) Therefore, calling the operations of defendant Hyman Harvey Klein and his associates a "joint venture" resulting in personal tax liability to them begs the question. Undoubtedly, the more centralized the control of the corporate structure, the closer in fact do the corporate activities approximate those of a true joint venture. But the close corporation and the "one man" corporation are recognizable as corporate entities for tax and other purposes. (*Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, 419.)

The nature of the problem, which the Government would have submitted to the jury as one of fact has been [6019] stated by Judge Learned Hand, when as a District Judge, he said in *Procter & Gamble* v. *Newton* (S. D. N. Y.) 289 Fed. 1015)

> "If our law regarded a corporation as an association of individuals created for purposes defined in their charter, whose extent was measured as we measure that of a consensual association, like a partnership, an unincorporated society, or a criminal conspiracy, the result would be simpler. Such a corporation would be immanent in everything which

> was done in execution of its purposes, or if we had the hardihood to adhere to the rigid convention of a corporation persona, in which, however empty a shell, all rights reside, and to which all duties attach, whatever the strain on our moral predilections, at least we should have a workable concept. As it is, our law has been baffled by the problem, and has wavered between the two alternatives. Since we have had no statute of uses to execute the dry use, I have no great confidence that I can pick a certain path among the cases."

His lack of confidence in his ability to "pick a certain path among the cases" was shown to be [6020] justified by his recital of the errors made by the Court of Appeals for the Second Circuit in subsequent decisions wherein that Court sought to express the test applicable in resolving the question of recognizing apparent corporate entities. (*National Investors Corporation* v. *Hooey*, 2 Cir., 144 F. 2d 466, 467, 468.)

However, in the National Investors case, Judge Hand adverted to what, in my opinion, is the test to be applied in the instant case and that is

> ". . . whatever the purpose of organizing the corporation, 'so longs as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.' 319 U. S. 439, 63 S. Ct. 1134, 87 L. Ed. 1499 . . . to be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial or other

> activity besides avoiding taxation: in other words, that the term 'corporation' will be interpreted to mean a corporation which does some 'business' in the ordinary meaning; and that escaping taxation is not 'business' in the ordinary meaning . . .".

[6021] So applied to the case at bar I must hold that a reasonable person on this record could not find that these corporations were not engaged in "some industrial, commercial, or other activity besides avoiding taxation" or in other words that this syndicate of corporations was a sham.

The Government's proof shows that seventeen such Cuban and Panamanian corporations were involved.

In its bill of particulars the Government set forth the "nature and source of the income on which it is alleged additional income tax was due" to be the proceeds of the purchase and sale of certain whiskey during 1944, 1945 and 1946 (excluding some small items of interest on bonds and dividends on stock). The Government's proof fairly parallels its bill of particulars and both result in a picture where five of the seventeen Cuban and Panamanian corporations named in the footnote (Agencias, Financiera Lloyds, Douglas Ryan, Cameron Stuart and Angues Kirby (Panama)) (Corporation A in 1944, 1945 and 1946 in the summary of the Government's proof, *supra*) paid the Canadian distillers $17,437,468.84 for the liquor purchased and four of the seventeen Cuban and Panamanian corporations, named in the footnote, (Agencias, Ramsey Scott, Exportadora Kent and Exportadora [6022] de la Costa) (Corporation A in 1944 and Corporations B and D in 1945 and 1946 in the summary of the Government's proof, *supra*)

received from American importers for the same whiskey $38,131,593.69. The Government having thus limited itself by its bill of particulars (and it could not have done otherwise) to the income of the four corporations which sold to the American market, the test of the recognition of the corporations for tax purposes must be confined to those four. When thus applied the record is abundantly clear that a reasonable person could not conclude that those corporations were a sham. They observed corporate formalities in their structure and functioning; they billed the American distributors for the whiskey; they collected for it; they paid their suppliers for it; they maintained active bank accounts in Cuba, New York and Canada in their own names and deposited therein and withdrew therefrom large sums in many transactions; in fact they did everything normally to be expected in the sale of over thirty-eight million dollars worth of whiskey at wholesale in the three years of their operation. To suggest that a reasonable person could conclude otherwise on this record would be sheer blindness.

[6023] But even if the "source and nature" limitation of the bill of particulars were to permit the inclusion of t[he] five of the seventeen Cuban and Panamanian corporations which purchased the liquor (one—Agencias—having for a time bought from the Canadian distiller and sold to the Amreican importer) the result would be no different. There too corporate form and activity to a greater or lesser extent is manifest.

Further, if all seventeen as a syndicate were to be subjected to the test, it is equally clear that as a unit they clearly met it and grouped according to their functions, i.e., those which bought from Canada, those which sold to

America, those, if any, which intervened between such purchase and such sale and those which acted merely as depositories of the funds, each, to the extent requisite by its functions, did likewise.

But the Government would discard such as indisputably (except to the Government) meet the test and pass upon those which functioned to a lesser degree. It would have a lay jury in a criminal prosecution in essence make the type of allocation heretofore reserved for the technical skill of the Secretary of the Treasury (Int. Rec. Code 1954 Sec. 482 [6024] and Sec. 7701 (11), in determining a civil liability for tax deficiency. So novel and unconscionable a procedure, this court summarily rejects. Even the technical skill of the Secretary has been repeatedly successfully challenged and the decisions still leave the question far from resolved. (4 Tax Law Review, 1948-1949, 131 et seq. 10 Tax Law Review, 1955, 307, at 325 et seq.)

It must follow therefore that the seventeen corporations were acceptable entities for tax purposes and not a sham and that their income was theirs and not that of Klein and his three Canadian associates. Klein therefore did not, as charged in Counts 1, 2 and 3 of the indictment attempt to evade individual income taxes in 1944, 1945 and 1946 by the means of reporting on a capital gain basise in 1947 and the remaining eight defendants in those counts could not have aided or abetted him in a crime he did not commit.

Even if I accept the Government's argument that the vulnerability of the Fourth Count is not hinged to the first three counts and that one may conspire to attempt to evade taxes and be held answerable therefor even though the taxes

were never [6025] due, all that follows is that the conspiracy count be tested independently of the substantive counts.

Applying the test to Count 4 I entertain no doubt that a reasonable person could not find upon the record herein that the nine defendants therein named conspired to attempt to evade the income taxes of Klein and his three Canadian associates for the years 1944, 1945 and 1946.

Upon the foregoing the motion of each defendant for judgment of acquittal as to him on Counts 1, 2, 3 and 4 is granted.

In view of the above holding it becomes unnecessary to treat with the several additional points raised by each defendant in support of his motion for judgment of acquittal on the first 4 counts.

The fifth count of the indictment presents an entirely different matter. It charges that the defendants therein named, i.e., the American resident defendant, Hyman Harvey Klein, the three Canadians and two other defendants, and certain co-conspirators, but not defendants, did violate 18 U. S. C. Sec. 371 by conspiring to defraud the United States by impeding, impairing, obstructing and defeating the lawful [6026] functions of the Department of the Treasury in the collection of the revenue, to wit, income taxes.

The inferences fairly to be drawn from the record are these—that in January, 1947, the defendant Klein and his three Canadian associates wound up the activities of the syndicate by transferring the funds into and in the four Panamanian corporations which were the depositories and by the three Canadians retaining three of these depositories and the

defendant Klein retaining the fourth, Tivoli Trading Company.

On March 27, 1947, at Klein's direction, checks were drawn each in excess of one quarter of a million dollars out of Tivoli's funds to Panamanian corporate nominees of defendant Alprin, one of the co-conspirators Koerner and Roer. The purpose of these payments is obscured by a veil of contradictions. Klein stated that they were in the nature of a bonus or a gift by him to Alprin, Koerner and Roer for their services in the operations of the syndicate in 1944, 1945 and 1946. Tivoli's books label them as commissions or expenses. Alprin, Koerner and Roer characterized them as dividends upon [6027] liquidation of Tivoli of their stock subscriptions in that company, Klein insisting that those stock subscriptions were long before cancelled. Even though the bank drafts, which represented these payments, were obtained in March of 1947, they were delivered with Klein's instructions (which Klein disputes) that they be not cashed and the proceeds thereof did not find their way into the hands of Roer until 1950, and Koerner and Alprin in 1952. Roer in 1950 and Koerner and Alprin in 1952 reported them as capital gains under a liquidation of Tivoli in their several tax returns for the year in which they were cashed. The Government charges in Count Five that this constituted a concealment of the nature and source of the income that was designed to impede, impair, obstruct and defeat the Treasury Department in its collection of

revenue and that it was the product of a conspiracy to so do.

Regardless of whether the defendants were successful in the alleged attempt to throw sand in the Government's eyes and regardless of whether the Government knew from other sources the nature of this income in 1950 and 1952, on the record, applying the agreed test, it cannot be said that a reasonable [6028] person could not conclude that there was such a conspiracy and that all of the defendants named in the Fifth Count participated therein. Here it must await the determination of a jury whether a conspiracy existed and which of the defendants participated therein.

Under the test, i.e., on the record in its present state, could a reasonable person conclude that the seven defendants therein named and the three co-conspirators and Roer conspired to cause Roer to file an income tax return in 1950 and Koerner and Alprin to file income tax returns in 1952 wherein each treated the funds received by him and originating from Tivoli on a capital gains basis for the purpose of concealing the nature and source of the net income of Alprin, Koerner and Roer during the years 1944, 1945, 1946 and 1947 and thereby impeding, impairing, obstructing and defeating the lawful functions of the Treasury Department in collecting income taxes, three hypotheses present themselves:—(1) the funds were a liquidating dividend due Koerner, Alprin and Roer for their stock in Tivoli; (2) additional income by way of commis-

sions, bonus or even a gift to Koerner, Alprin and Roer for their services in bringing about the [6029] success of the Harwood venture and (3) they were neither.

Treating these hypotheses seriatum, it would appear that the motions for judgment of acquittal on the Fifth Count must be denied. As to the first:—a reasonable person could conclude on the record that these funds were a liquidating dividend as claimed by Koerner, Alprin and Roer. If that is so, then at least defendant Klein and the co-conspirator Rokoff conspired to label these funds in the books of Tivoli falsely, i.e., as commissions.

However, a reasonable person could conclude on the record in its present state the second hypothesis:—that these funds were not a liquidating dividend but were additional ordinary income paid to Koerner, Alprin and Roer for their services in the Harwood deal. In that event it would appear that the defendant Alprin at least fraudulently stated, as did Koerner and Roer, that these funds were other than ordinary income when Roer filed his return in 1950 and Koerner and Alprin filed theirs in 1952. Such finding is not in my view limited to a conspiracy between defendant Alprin and co-conspirator Koerner. [6030] In view of the testimony exposing the circumstances under which twelve corporations were formed in Cuba by Koerner, Alprin and Roer, i.e., that although the Cuban attorney Valverde undertook the formalities of the formation of these corporations, he did so

upon the recommendation, under the guidance and with the active participation of the law firm theretofore representing the interests of the defendant Hyman Harvey Klein and his three Canadian associates, co-defendants, and the payment of these funds to two of those corporations, it might be reasonably concluded on the record as it now stands that the misbranding of these funds in the 1950 Roer return and the 1952 Koerner and Alprin returns was the product of a combine of the seven named defendants and the three named co-conspirators.

Finally, on the record in its present state, a reasonable person could conclude that it was neither a liquidating dividend nor income to Koerner, Alprin or Roer. It must be remembered that these drafts were procured at a time when Klein was in income tax difficulties. The conflict in the testimony between Klein and Rokoff who claimed the payments to have been ordinary income to Koerner, Alprin and Roer, and that [6031] of Koerner, Alprin and Roer who claimed to have been a liquidating dividend, when coupled with the unusual, to say the least, impounding of these substantial funds aggregating over three quarters of a million dollars, might lead to the rational conclusion that a purpose other than that claimed by either side of the dispute as to the character of this money was the fact and that it was to be given the appearance of a legitimate expenditure by Tivoli until the conclusion of Klein's then income tax difficulties after which it would be disposed of

in some manner to be agreed upon by the parties. If so, all defendants named in the count could well be found to have participated in a conspiracy to thus throw sand in the Government's eyes in the performance of its functions respecting income taxes.

The court rejects the limitation proposed by defendant Alprin that the function allegedly obstructed must be limited to those performed by the Collector of Internal Revenue.

In view of the suggestion in each hypothesis above analyzed that the defendant Klein could be found to have been involved and the further fact that Haas [6032] prepared Klein's 1947 return and was (by the testimony of Bennett) indicated to have had a closer contact with the books of at least one of the companies involved, a reasonable person could conclude that his participation was more than that of an accountant who prepares a return from figures given to him by his client, to mention nothing of the inferences that might be drawn from the sale to him by Roer of La Ribera at Klein's behest and the loan to La Ribera by Klein of the $35,000 and Klein's refusal to accept its return after these funds were unfrozen in Canada.

It must be borne in mind that the court is now dealing only with motions for judgments of acquittal and must determine them on the basis of the test previously herein set forth. Were the court to entertain the conviction that it had with respect to the first four counts requiring the granting of acquittals as to those counts, it would not hesitate to do

likewise as to the fifth. However, for the reasons above set forth, it does not entertain such convictions with respect to the Fifth Count, and therefore denies these motions for acquittal addressed thereto.

[6033] The basis of any of the above outlined hypotheses contemplates the conspiracy to have terminated upon the filing of the Koerner and Alprin returns in 1952. Therefore, under 18 U. S. C. Sec. 3282 the indictments herein were filed well within the period of limitation imposed.

The court declines to entertain an application made by defendant Haas—

> "The defendant Haas renews all motions that were made in his behalf prior to the trial herein with the same force and effect as if made now, and likewise all motions made prior to the trial by the other defendants which in any way pertain to the offenses charged herein."

Between last Thursday at noon and the reconvention of this trial this morning, the court was given on these motions a 35-page brief by defendant Haas, an 87-page brief by defendant Alprin, a 120-page brief by defendant Klein, a 34-page brief by defendant Koerner, a 46-page brief by defendant Roer and a 164-page brief by the Government, not to mention appendices of the evidence by defendant Roer and another by defendant Koerner and transcript [6034] of portions of the minutes by defendant Roer running into hundreds of pages. Even if this court were disposed to act as an appellate tri-

bunal and review all motions made by all defendants prior to the trial, it would have been a physical impossibility without adjourning this jury trial for an inordinately protracted period. In view of the fact that this court does not know of all motions made by all defendants prior to trial, it will not undertake to advise itself thereof and in the absence of such advice it will not undertake to summarily deny the application because of the possible impact that such denial might have on the rights of any defendant and of the Government. For those reasons, the court refuses jurisdiction of that motion, if such it be, under the circumstances presented and defendant Haas, if he is convicted, will have to be content with the normal review of the decisions on these pretrial motions to the extent they may be reviewable.

Defendant Haas' motion to strike Government 337 is denied.

* * *

COURT'S STATEMENT TO JURY

[6043] (The jury entered the courtroom.)

The Court: Ladies and gentlemen, since we last convened certain motions were made by the defendants with respect to the indictment, which you will recall contained five counts. That you may fully understand what was done I remind you that the first three counts charged an attempt by defendant Klein to evade his individual income taxes for the years, 1944 in the first count, 1945 in the [6044] second count and 1946 in the third count by having filed a 1947 return claiming as capital gain that

which the Government said should have been reported in 1944, 1945 and 1946 as individual income.

You will recall also that the fourth count—oh, before I come to that, you will also recall that the first three counts charged the remaining defendants named in each of those counts with having aided and abetted Klein in that attempted evasion named in those three counts.

You will also recall that the fourth count charged a conspiracy to accomplish the attempted evasion mentioned in the first three counts.

For legal reasons the Court has granted the defendants' motions for judgments—directed judgments of acquittal on the first four counts, and those counts are no longer in the case. That leaves us with but one count to concern ourselves about from here on out, and that is the fifth count. And you will recall that in the fifth count it was charged that the defendants therein named—and I would remind you that Koerner and Roer, while they were defendants under the first four counts, were not joined as defendants by the Government in the fifth count, so they are out of the case. They [6045] are not here any more. You might notice that they have gone—that is, their counsel are gone.

Now, the fifth count charges that Klein and Haas and Alprin, and certain other persons therein named not on trial herein, entered into a conspiracy to defraud the Government in the exercise of its tax-collecting functions by having produced or procured the filing in 1950 by Roer of a tax return in

which he claimed that the check that he received from the Tivoli funds, or that the corporation which he controlled received, was a liquidating dividend of his interest in the Tivoli Corporation. And that it was part of that conspiracy also to induce Koerner, who is named as a co-conspirator but not a defendant in the fifth count, to do likewise in 1952. And that it was part of that conspiracy to have Alprin, who remains as a defendant on the fifth count, to do likewise in 1952.

Now my purpose in detailing this to you and in reminding you thereof is to dispel any notion whatsoever, if any exists in your mind, and I am sure that it doesn't, but I want to be abundantly cautious, that merely because for legal reasons the fifth count survives that that is to be construed as any expression by me to you or any intimation of any sort of the guilt [6046] or innocence of the defendants remaining under the fifth count. In other words, to state it otherwise, the mere fact that I dismissed the first four counts for purely legal reasons is not to be taken by you as any indication that because I did not dismiss the fifth count I am making any expression as to the guilt or innocence of any defendant named therein.

Now of course there remain in this trial three defendants under the fifth count as I indicated, Mr. Klein and Mr. Haas and Mr. Alprin. And they, as is their right, and as is the obligation of their counsel, have some additional motions to make before the Court before we resume the trial on the

fifth count, if we do. Those motions won't take as long as did the last—at least I hope so—and I hope they don't impose the same burden on counsel and the Court. But in any event I see no purpose in keeping you sitting in the juryroom during the protracted argument of those motions. We have estimated that the argument will not be concluded until possibly noon tomorrow. So I am going to ask that you retire now and you are free to go for the rest of the day and we will reconvene at 2:15 tomorrow afternoon. And by that time we hope the decks clear one way or another to determine which way [6047] we are going to go in this case. So you are excused now until 2:15 tomorrow afternoon. Thank you.

* * *

[6063] The Court: Government's 1 was the O. P. A. price order issued March 14, 1944 by the Office of Price Administration to R. C. Williams & Co., Inc. It was received at page 217 of the stenographers' minutes but was excluded as to the defendants Klein, Haas and Roer.

* * *

MOTIONS TO STRIKE EXHIBITS AND RULINGS THEREON

[6064] The Court: All right. Now what motion, if any, does Defendant Alprin make with respect to Government's 1?

Mr. Donohue: On this subject matter will your Honor permit my associate, Mr. Goldstein, to speak for defendant Alprin?

The Court: Yes.

Mr. Donohue: Thank you, your Honor.

Mr. Goldstein: We move to strike Government's Exhibit 1 on the ground that it has no relationship to [6065] any of the allegations of the fifth count. It was put in principally to support one of the elements set out in the fourth count and can serve as no background so far as we can see.

The Court: Motion denied.

In my view of the fifth count it very definitely is relevant. Remember that the fifth count is not confined in my view to merely the three returns that were filed by Roer in 1950 and by Koerner and Alprin in 1952. That was only part of the conspiracy. As I understand the fifth count this is a conspiracy entirely different and distinct from the conspiracy charged in the fourth count. The conspiracy charged in the fourth county was a conspiracy to attempt to evade Klein's taxes for certain given years. This is a conspiracy alleged under 371 of Title 18 to in some manner impede or obstruct the Government in the function of one of its agencies, i.e., the Treasury Department in the collection of income taxes. Therefore, while it is true that the indictment recites that part of that conspiracy—and I emphasize "part"—were the filing of the Roer, Koerner and Alprin returns in 1950 and 1952 respectively, the Government as I read the fifth count does not limit it to those. Anything that [6066] happened beyond June the 1st of 1946 from which the jury might conclude beyond a reasonable doubt that there was a conspiracy to throw sand in the Government's eyes in my view is admissible.

Mr. Goldstein: Your Honor,——

The Court: Excuse me. And anything that happened prior to June the 1st, 1946, that will indicate to the jury the background or the atmosphere upon which the alleged conspiracy allegedly originating on June 1st, 1946 is also admissible. And on that basis, particularly in view of the fact that this Government's Exhibit 1 was produced and delivered to Jacobs by Koerner in Alprin's presence at their conference, makes it admissible and the application to strike it out as to the defendant Alprin is denied.

* * *

[6067] Government's 2-A thus marked was the draft originally given Jacobs by Alprin at the first conference in March, 1944 when Alprin and Koerner came to Jacobs' office. This was excluded as to the defendants Klein, Haas and Roer.

2-B was so marked at page 226 of the record and that was a draft discussed by Alprin and Jacobs at the four, five or six conferences after the original March, 1944, conference between Jacobs, Alprin and Koerner. That was excluded as to Klein, Haas, Koerner and Roer.

[6068] Now, then, as to 2-A I take it no motion is being made by either of the defendants Klein or Haas because it was never received as to them. As to the defendant Alprin?

Mr. Goldstein: Your Honor, we move to strike 2-A on the ground that—may I state that we are moving to strike it—may I state the general purpose

in making these objections: It seems to me that the course that your Honor is embarking on by your reference to the OPA price order as background is that you are setting the stage for some three or four hundred exhibits being background for something which on the face——

The Court: Why undertake to anticipate what I am going to do? In my mind I am only dealing with one exhibit at a time. If it requires that I feel that the whole 300 or 400 fall into that category then they are going in. But why anticipate that that is what I am going to do? You may differ with me, and that is your privilege, but I feel that the OPA order, and I don't want to revert to reargument on that, I feel that the OPA order is a part of the inception of this thing that the jury should know about. It is in, it is in as to Alprin; it was [6069] delivered when Alprin was there, and it was part of his conversation with Jacobs that ran up to the formation of the contract between R. C. Williams and Agencias. I feel it is part of the case. You are entitled to your opinion, but it happens that at least in this orbit my opinion is the one that controls. I am happy to hear your argument on it, but I disagree with you.

As to 2-A, confine yourself to 2-A without couching it in the aura that I am going to admit 400 exhibits. I don't know. I may very well admit every exhibit.

Mr. Goldstein: I know, your Honor; I am trying to abstract——

The Court: I am prepared to hear your argument on every exhibit. I think that is my obligation to you. And you have the right to look to me for that, and I propose to perform what I deem to be my duty. But it is not necessarily my duty to accept your argument. I will listen to it, and if I think it is right I will accept it, and if I think it is wrong I will reject it.

Now, Exhibit 2-A.

Mr. Goldstein: Your Honor, as part of my [6070] argument I am suggesting that the logic for admitting 2-A is to set the stage for further rulings which would make the background of this case preponderate far beyond anything that could conceivably be relevant to the case.

The Court: Am I correct in my understanding that this is a document that Aplrin gave to Jacobs?

Mr. Goldstein. That has no relationship to the issues in the indictment as it now stands.

The Court: Of course it is relevant on the theory of our construction of the fifth count. I suspect that you are laboring under what I believe to be a misapprehension that the fifth count was confined only to the three tax returns.

Mr. Goldstein: No.

The Court: I don't construe it at all——

Mr. Goldstein: I contrue it as charging a conspiracy to defraud the Government beginning in 1946 with regard to some particular aspect of the Treasury's functions, to wit, the collection of in-

come taxes. I don't think that negotiations between R. C. Williams and Harwoods can have any relevance to that question.

The Court: I beg to differ and disagree [6071] with you, and I am overruling the motion of the defendant Alprin to strike Government's 2-A.

Now Government's 2-B, I take it there is no motion by either Klein or Haas, it never having been received as to them.

Now with respect to Alprin.

Mr. Goldstein: Objection on the same ground, your Honor.

The Court: The same ruling.

Now, then, we come to the next exhibit which was Government's 8, and I am taking them in the order in which they are received in the minutes, gentlemen;

* * *

[6072] We will ignore that and merely identify Government's 8 as the opinion of tax counsel which Alprin showed Jacobs when they discussed the final draft of the agreement at Jacobs' office a few days after one of the main conferences at which all of the parties attended in the latter part of April.

Now that opinion was excluded only as to the defendants Roer and Koerner, it was received as to the defendants Klein, Haas and Alprin.

* * *

[6072] Mr. Kiendl: The only objection we have to the exhibit now, if your Honor please, is that the

four counts having been eliminated it is not material to the fifth count. It is our general objection.

The Court: Motion to strike is denied, motion by defendant Klein to strike is denied.

[6073] As to Haas?

Mr. Bender: I have no objection to it remaining.

The Court: Alprin?

Mr. Goldstein: I have the same objection, your Honor.

The Court: The same ruling. Motion to strike by Alprin is denied.

The next exhibit received at page 243 was Government's 3. This was a letter written by Alprin to Jacobs dated April 4, 1944.

Mr. Kiendl: We have the same general objection to it. That is the one we didn't object to when it was received, your Honor.

The Court: Yes. It was excluded as to defendants Haas, Roer and Koerner; it was received as to Klein and Alprin.

* * *

[6074] Mr. Bender: Your Honor, would it be permissible for me at this time to restate my motion? Since I took the position that I have no objection, may I withdraw my statement as to no objection and likewise join with Mr. Kiendl and Mr. Donohue in moving to strike the Haas opinion?

The Court: Namely, Government's 8.

Mr. Bender: That is right, on the ground that it has no relation whatsoever to the fifth count.

The Court: That motion is denied.

We will revert again to Government's 3. Defendant Klein's objection is overruled.

Mr. Goldstein: The same objection, your Honor.

The Court: Overruled. And it was not admitted as to Haas originally.

Now, then, Government's 4 was the principal contract drawn by Jacobs, the final contract. That was excluded as to Haas and Roer at the time.

Mr. Kiendl: We press our objection to strike as to that one on the general ground.

The Court: Overruled.

[6075] Mr. Goldstein: The same objection, your Honor.

The Court: The same ruling.

Government's 5 was what has become to be known as the supplemental contract. I identified it in my notes as a later supplement to the principal contract also drawn by Jacobs. It was received at page 250 of the minutes and excluded as to Haas and Roer.

Mr. Kiendl: The same position as to Exhibit 4.

The Court: Klein's motion to strike is denied.

Mr. Goldstein: The same objection, your Honor.

The Court: Alprin's motion to strike is denied.

* * *

[6076] Now, then, we come to the next to be received at page 262, Government's 6. This was a letter dated April 20, 1944 from Williams to Agencias Destiladores, forwarding the agreement, Government's Exhibit 4, and the supplement, Government's Exhibit 5, to the order for 100,000 cases

of Harwoods which later became Government's 7. That was excluded as to Haas and Roer.

Mr. Kiendl: We have the same motion to exclude as to the defendant Klein on the general ground that it is wholly immaterial and too remote from the alleged conspiracy in the fifth count in the indictment.

The Court: Denied.

Mr. Goldstein: The same objection.

The Court: The same ruling as to Alprin.

Now, then, Government's Exhibit 7 was the order dated April 18 from Williams to Agencias, ordering 100,000 cases of Harwood. It was received at page 262, excluded as to Haas and Roer.

I take it Klein voices the same objection?

Mr. Kiendl: The same objection.

Mr. Goldstein: The same objection.

[6077] The Court: And the objection is overruled, as is that of the defendant Alprin thereto.

Next received in the minutes is Government's 9 which was received at page 266. This is a letter dated December 29, 1944 from Alprin to Williams confirming an understanding that Williams was to pay Alprin 60 cents a case on Harwoods sold through R. C. Williams & Company, wholesale division, to retailers for Alprin's services to R. C. Williams in the matter of the contract.

Government's 9 was excluded as to defendants Klein and Haas.

* * *

Mr. Goldstein: We object to it, your Honor, as completely collateral and immaterial to the fifth count.

[6078] The Court: Objection overruled.

Next was Government's 10 and that was a letter dated January 26, 1945 enclosing a bill from Alprin to R. C. Williams & Company. It was excluded as to Klein, Haas and Roer and received as to Alprin and Koerner, as appears on page 266 of the record. So the only one who might be heard from now is Alprin.

Mr. Goldstein: We object to it on the same ground, your Honor.

The Court: Overruled.

The next, Government's 11 was received at page 283, and at page 1385 Rudin identified Jacobs' writing on Government's 11. That is Alprin's letter of April 7, 1947 advising Williams of no claim for payment of 60 cents a case on certain Harwoods beyond the termination of the contract in early June, 1946. It was originally at page 283 limited only as to the typewritten portion and the signature, but at page 1385 during Rudin's testimony he identified the handwriting on it as being that of Jacobs, and it was origianlly excluded as to Klein, Haas and Roer, so the only one that may be heard from would be the defendant Alprin.

[6079] Mr. Goldstein: The same objection, your Honor.

The Court: The same ruling.

We now come to Government's 12 which was received at page 285, and that was a letter from Agencias to Williams permitting Williams to inquire re shipment of Harwood directly from Duncan Harwood. It was excluded as to Haas and Alprin and received originally as to Klein, Koerner and Roer. So the only one that may be heard from now would be Klein.

Mr. Kiendl: We have the same motion as to that.

The Court: The same ruling.

Mr. Kiendl: On the same general grounds.

The Court: The same ruling.

Now we come to Government's 24 which was the next document received in evidence. That was a letter of December 29, 1945 from Ramsey Scott to Williams re the assignment of the contract by Agencias. That was excluded as to Haas, Roer and Alprin and receive originally as to Klein and Koerner only, so that the only defendant now to be heard on it would be the defendant Klein.

Mr. Kiendl: We object to it on—we press [6080] our motion on the general ground, if your Honor please, and then we also direct your Honor's attention to the fact that that letter would not constitute any background material for the fifth count on any theory.

The Court: What about that, Mr. Bauman?

Mr. Bauman: As I remember that exhibit, it is the letter——

Mr. Kiendl: Assignment.

Mr. Bauman: The assignment from Agencies to Ramsey Scott or at least a letter purporting to come from Ramsey Scott acknowledging that the contract had been assigned. As far as I can see it, in the light of the charge which remains in the fifth count, this act, this read against the factual background at the time it occurred, in so far as Jacobs' testimony is concerned and in so far as Koerner's action is concerned, Koerner being an alleged coconspirator under the fifth count, I think is proper background in explanation of the conspiracy that later came into existence with relation to the fifth count.

The Court: The objection is overruled.

[6081] Government's Exhibit 25, page 303. That was a letter of December 28, from Agencias to Williams re the assignment. There again it was excluded as to Haas, Roer and Alprin, so the only defendant to be heard thereon is the defendant Klein.

Mr. Kiendl: The same disposition as to Exhibit 24.

* * *

[6081] The next to be considered is Government's Exhibit 29, which was received at page 412.

This was excluded as to Klein, Haas, Alprin and Roer—it was the first affidavit, re Harwood commissions prepared by Jacobs for Koer er, et cetera, et cetera.

In view of the fact that none of the surviving defendants—it was not admitted as to any of them, I see no basis on which they can move to strike it on the fifth count—it is not in the record any more.

* * * *

[6082] Mr. Bauman: May I have just one moment to look at it?

(After examining) Your Honor, the Government would like to be heard on the question of retaining this exhibit in evidence for the following reasons:

This affidavit, or what purports to be the first page of an affidavit was prepared during 1948 at the request of one of the co-conspirators on the fifth count, Irving Koerner.

The Court: No, it was prepared at the request of Agent Victory of the Internal Revenue Service.

* * *

[6083] Mr. Bauman: And indeed that is one of the reasons that the Government feels that what I think is an excellent expression of the fifth count on the question of whether or not this is an attempt to throw sand in the Government's eyes, that particularly since it was asked for by Victory and particularly since it was intended to cover up this situation, that it should be admissible in connection with the fifth count.

* * *

[6087] The Court: And we will come back and reconsider later on whatever application the Government may be disposed to make with respect to

exhibits admitted, or testimony received as to defendants no longer in the trial.

The first one that will go on that list for later consideration will be Government's Exhibit 29.

* * *

[6098] The Court: Well, will this be satisfactory:

That it is now deemed that each of the three defendants now on trial have stated a motion to strike each of the exhibits heretofore considered.

Mr. Bender: Yes.

[6099] The Court: And that the ruling by the Court with respect heretofore as to each is the ruling now with respect to all three.

Mr. Bender: Perfectly satisfactory, Judge.

Mr. Kiendl: Yes.

The Court: All right.

Henceforth the Court will invite any motions by all three defendants as to every exhibit that will come up for consideration.

* * *

[6100] The Court: Now then we next received Government's 18-A to K inclusive at page 434. These were the invoices similar to those typed by Mrs. Lowy when she was Klein's secretary from data obtained from Duncan Harwood invoices supplied to her by Rokoff. And [6101] this was received as to Klein and excluded as to Haas and Alprin.

Mr. Kiendl: That we certainly move to strike out, if your Honor please. Even under the most liberal view we don't see how that could possibly pertain to any of the issues raised by the fifth count of this indictment.

Mr. Bender: The same objection.

Mr. Donohue: The same objection.

The Court: What about that, Mr. Bauman?

Mr. Bauman: Well, the Government feels, sir, that having come to the conclusion that the background material is properly within the area going back to the R. C. Williams—indeed before that—that these actions—and I am including the preparation of these invoices and similar invoices in Baltimore as against the defendant—and my recollection is that that young lady testified that invoices like these were prepared in Baltimore, and Mr. Rokoff substantiated that testimony himself—that——

The Court: Well, of course there was this conflict as I recall it. She said that she prepared invoices similar to these, and I think Rokoff's testimony is that he did all the invoice typing. But I may [6102] be mistaken about that.

Mr. Bauman: I think she said she prepared some.

The Court: Yes.

Mr. Bauman: But your recollection of facts is much better than mine.

I think that these invoices are proper background testimony read against all the facts in the case and read against the——

The Court: I am disposed to agree with you. The motions to strike are denied.

* * *

[6107] The next exhibit was Government's 15-A to E, the invoices of H. Harvey Co., Ltd. identified by Mrs. Lowy and received at page 445.

Now it would appear to me, and I am not prejudging whatever motion may be made, that these four are pretty much in the same category as Government's 13-A to K.

Mr. Kiendl: These are the sales of H. Harvey Company, not Agencias. We submit they are wholly immaterial.

The Court: Mr. Bender?

Mr. Bender: The same objection.

The Court: I take it the same from the defendant Alprin.

Mr. Goldstein: Yes, your Honor.

The Court: The motion to strike is denied.

* * *

The next was Government's 16-A to D. These were the allocation sheets similar to those typed by Mrs. Lowy from data supplied by Rokoff at the Baltimore office.

Mr. Kiendl: We have the same motion on the general ground.

The Court: Mr. Bender?

Mr. Bender: The same motion.

[6108] Mr. Bender: We have the same motion on the general ground.

The Court: Mr. Bender?

Mr. Bender: The same motion.

Mr. Goldstein: The same, your Honor.

The Court: What about that, Mr. Bauman?

Mr. Bauman: As to these, I think these go to the essence of the fifth count and the reason—certainly they are very important I think in considering the fifth count when read against the background of the defendant Klein's manipulations and operations, and I think that——

The Court: Well, may I pin you down to a specific, please. In what wise would that be indicative of an agreement to conceal from the Government income or to as I used the term, throw sand in the Government's eyes, the mere fact that Klein made allocations in Baltimore and sent them on to Koerner, assuming that a jury could find that that is what these sheets indicate?

Mr. Bauman: I don't want to misstate the facts. Will you give me just one second?

Mr. Tyler's recollection is the same as mine, and so I venture it without too much confidence, and that is my recollection is, and it is Mr. Tyler's, that [6109] in Klein's statement he denied supervision of the allocations of Harwood Whiskey and said, as I remember it, that it was within the powers of R. C. Williams and more particularly Koerner.

The Court: Well, let us assume that, and my recollection agrees with yours, but let us assume that. What probative value does that have on the issue posed by the fifth count, i.e., a conspiracy to

conceal from the Government the nature and source of income, a conspiracy to obstruct the Government in determining tax liability, income tax liability? Asumming that Klein did have, the mere fact that there may have been this liason between them in the area of commissions, in the area of allocations, in the area of determining who the salesman should be, what probative force does that have with respect to the allegation that they engaged in another type of conspiracy, i.e., to obscure income from the Government?

Mr. Bauman: Well, is the effect or if Klein's actions as well as those in the others were had in contemplation of secreting or beclouding or hiding and were done for purposes of concealment, then I would suggest that the jury might consider that as part of the background leading up to the charge in [6110] the fifth count.

The Court: Well, no. I appreciate your position of an advocate in trying to save as much in this as you can, but yet what background is necessary for this jury, starting June 1, 1946? Only the most general background of the dealings of the parties that rose to a point where the conspiracy allegedly came into being. And I cannot for the life of me see—I can see where the agreement between Williams and Agencias is in that category; I can see where proof of the sale and delivery of whiskey is in that category, and I can see where a supplemental agreement is in that category, but I can't see where any arrangement between them that Klein might make

allocations or that Klein might dictate who the salesmen would be—that I think is too remote.

Mr. Bauman: Sir, I see that, and I think maybe I haven't stated it too well. As a matter of fact, I know I haven't. What I am getting at is this. The mere fact that these are——

The Court: Let me interrupt you again. Will you bear with me to let me ask you this very point in question.

Mr. Bauman: Surely.

[6111] The Court: Could a reasonable person beyond a reasonable doubt, and now I am putting myself into the situation of what the jury has to do, not a motion for judgment of acquittal, and that is why I injected the "beyond a reasonable doubt", conclude from the mere fact that Klein had an arrangement to make allocations, that Klein had an arrangement to dictate who the salesmen should be with Koerner, that there could rationally flow from that conclusion Klein and others, Koerner as a co-conspirator, were engaged in a conspiracy to blind the Government to the nature and source of income tax? And I think that there again you are getting beyond the necessities of background.

Mr. Bauman: Your Honor has put the question exactly. I say in this case the answer is Yes, and the reason I say that the answer is Yes, is that if Klein and Koerner acted under circumstances showing a concerted action to misrepresent, showing a concerted action to conceal, to hide, to—well, you can just simply add synonyms, but what I am talking

about is a relationship which was nased in concealment, that that, sir, in my opinion, is exactly the kind of evidence which explains, and I am roughly paraphrasing the language in the Witt case, how this conspiracy came into existence, [6112] why it was Klein and Koerner rather than Klein and Zilch, why it was Koerner rather than just somebody out of the clouds.

The Court: Let me ask you this. Suppose Klein had never been asked and had never made any statement to his interrogators at the Internal Revenue Service with respect to these allocation sheets. Would you still maintain that the allocation sheets were admissible?

Mr. Bauman: I would for the reason I have just given, your Honor, that, namely, that it shows why, when this conspiracy came into existence, it was Koerner who was one of the conspirators selected because he and Klein had previously a relationship of this type which insured to Klein a man who would do his bidding under the fifth count.

[6113] The Court: Well, I am going to overrule the—that is, deny the motions to strike Government's 16-A to D, inclusive.

We now come to Government's 17, and those were certain notes in connection with allocation sheets which were dictated by Klein and typed by Mrs. Lowy.

Now of course to the extent that I may be right or wrong in denying the motion to strike 16, I would be right or wrong if I adhere to the same decision

with respect to 17 because I think they are collateral. However, the defendants are invited to put their motions on the record.

Mr. Kiendl: We have the same motion as to 17 as we had to 16-A to D.

Mr. Bender: The same.

Mr. Goldstein: The same.

The Court: The same ruling. I perpetuate my error!

Mr. Kiendl: I am afraid so, your Honor.

The Court: Now we come to Government's 18, which was admitted at page 453 of the minutes, and that was a letter from Ramsey Scott on the impressed letterhead to Koerner at R. C. Williams re the assumption of [6114] the Agencias Destiladores agreement with R. C. Williams by Ramsey Scott Exportadores.

Mr. Kiendl: We make the same motion as to that as we made regarding one of the prior exhibits 24.

The Court: Yes.

Mr. Bender: The same motion, your Honor.

Mr. Goldstein: The same motion.

The Court: Denied.

* * *

[6121] The Court: Yes.

Now the next exhibit in evidence was Klein's E, because C and D were not offered. And Klein's E was a letter from the Cuban law firm returning copies of the amended and supplemental agreements

between Williams and Agencias, and on the basis of my having admitted the agreement I would be disposed to admit the letter of transmittal, but you are at liberty to put your objection on the record.

Mr. Kiendl: We make the same motion, if your [6122] Honor please, on the general ground only.

The Court: Yes.

Mr. Bender: The same motion.

Mr. Goldstein: The same motion.

The Court: Those motions are denied, and Klein's E will not be stricken.

The next that was received in that order was Klein's H, and that was a letter from Agencias to Williams confirming the order for the hundred thousand cases of Harwoods whiskey, at page 683 of the record.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Goldstein: The same motion.

The Court: Denied.

The next is a cable, Klein's G received at page 718 of the record, cable from Agencies to Williams advising the acceptance of the order for the hundred thousand cases.

I take it the same motions are made by all three defendants.

Mr. Kiendl: Yes.

Mr. Bender: Yes.

Mr. Goldstein: Yes.

[6123] The Court: And the motions are denied.

The next received was Klein's F at page 721. That was the cablegram from Agencias to Williams, advising acceptance, signature and return of the agreement.

I take it the defendants make the same motion?

Mr. Kiendl: Yes.

Mr. Bender: Yes.

Mr. Goldstein: Yes.

The Court: And those motions are denied.

The next is Klein's J, a letter from Agencias to Williams requesting amendment of the letters of credit on or after January 16, 1946, and I take it that that would be in connection with the transfer to Ramsey Scott of the contract that brought into being the third letter of credit.

Mr. Kiendl: We have the same motion.

Mr. Bender: The same motion.

Mr. Goldstein: The same motion.

The Court: Denied.

Mr. Kiendl: I think that is right.

* * *

[6124] The Court: And the next we come to is Defendant Klein's K on page 756 of the record. That was a letter from Williams, signed by Koerner, to Ramsey Scott acknowledging Ramsey Scott's letter retaking over the contract and agreeing to reestablish a letter of credit.

Mr. Kiendl: The same motion.

The Court: The same motion by all three defendants?

Mr. Bender: Yes.

Mr. Goldstein: Yes.

The Court: And the motion is denied.

* * *

[6126] The Court: All right.

The next will be Alprin's R which was received at page 854 of the minutes, and that was a draft of a supplemental agreement between Williams and Agencias Destiladores, S. A. which became Government's 5, if I correctly recall the number.

Having admitted Government's 5 on the general [6127] background I would be tempted to indicate to the defendants that I would be disposed to admit a draft thereof as I admitted the drafts in Government's 4. But they are nevertheless invited to place their motions on the record.

Mr. Kiendl: Despite the fact we anticipated that ruling we move to strike out the exhibit.

Mr. Bender: The same motion.

Mr. Goldstein: The same motion.

The Court: Denied.

The next is Government's S.

Mr. Kiendl: Government's S? Alprin's S.

The Court: Excuse me, Alprin's S appearing at page 859 of the minutes, and that was Jacobs' letter to Alprin enclosing the supplemental agreement.

Mr. Kiendl: The defendant Klein moves to strike it.

The Court: I take it Haas does likewise?

Mr. Bender: The same motion.

Mr. Goldstein: The same motion.

The Court: Denied.

* * *

[6130] Mr. Kiendl: If your Honor please, in that connection, at this time may I inquire if I understand right, in connection with your Honor's ruling permitting the general background material by way of atmosphere, so that the jury can appreciate the setting, that it is only admitted for that purpose and not for the purpose of establishing in anywise the existence or formation of the conspiracy alleged in count 5?

The Court: Oh, definitely, and that is why, incidentally, I took as the breakoff point June 1, 1946, and pinned Mr. Bauman down to a specification as to that letter of July, 1946, because background material ceases on June 1, 1946. From then on it would have to appear that the exhibit has some rational probative connection with the conspiracy alleged.

Mr. Kiendl: You see my doubts in that connection in putting in our defense.

The Court: Surely. May I also suggest that the defendants frame and submit to the Court an appropriate charge, if it escapes me, that the jury be instructed that any material prior to June 1, 1946, that was permitted to remain in evidence was only done so to permit them to grasp the setting

from which the [6131] alleged conspiracy could be found.

Mr. Kiendl: And not as proof of the existence and formation of the conspiracy.

The Court: Exactly, and I would ask one of the defendants, at least if not all, to make an appropriate request to charge that.

Mr. Donohue: That leaves me a little confused because I recall Mr. Bauman saying to your Honor that the reason that he thought the allocation should be allowed is to show a concert of action between Mr. Koerner and Mr. Klein to conceal something which occurred prior to June 1, 1946, which was Mr. Bauman's concept that that was admissible as background or as proof of conspiracy.

Mr. Bauman: Oh, no, I am sure the Court understood that.

The Court: Well, I understood, and if I did not I want you to correct me. I understood Mr. Bauman not to maintain that the allocation sheets were any proof of a conspiracy to blind the Government, except that they indicated an association between these parties from which that, connected with other things, it might be taken to rationally indicate that such a conspiracy might have occurred.

Mr. Donohue: Well, I wish I could think that [6132] Mr. Bauman's view was that expressed by your Honor, but I don't think the record will support it.

Mr. Bauman: I think you are quite wrong, Mr. Donohue.

The Court: Well, let us straighten it out regardless of what the record discloses.

Did I correctly state your argument?

Mr. Bauman: You certainly did.

The Court: All right. Does that satisfy you now, Commissioner?

Mr. Donohue: Well, his present statement does but I will still be happy to look at the record.

The Court: No, but assuming that he misspoke himself on the record, are you satisfied now, as of now, what his position is?

Mr. Donohue: I am satisfied by what he said, your Honor.

The Court: Yes. Well, you don't have to accept it.

Mr. Donohue: Yes.

The Court: I appreciate that.

(Laughter.)

The Court: All right.

* * *

[6134] Now the next exhibit to be received was Government's Exhibit 21, and that was at page 960 of the record. It consists of a letter from Klein to Ostrow of J. J. Dunbar & Company, inclosing a tax opinion of J. Stanley Alprin, attorney, to Klein.

Mr. Kiendl: The defendant Klein moves to strike it on the ground that on any theory it wouldn't constitute background material.

Mr. Bender: The same motion.

Mr. Donohue: The same motion, your Honor.

Mr. Bauman: As to that one, your Honor, the Government suggests that it is in a similar, although not identical, category—similar category to Government's [6135] Exhibit 8.

The Court: Yes. Motion denied.

* * *

[6143]: The Court:

* * *

You know, we sit here in this ivory tower atmosphere and we assume that these people that sit in jury boxes don't know anything, and I think we make the wrong assumption. I think they have a pretty good idea of the entire background of this thing regardless of what we admit or strike. They know by now that $17,000,000 worth of whiskey was bought and $30,000,000 was sold, that people got commissions. They know all that. And by our going through the ritual of telling them, "Well, now, we are striking out this and we are striking out that," I frankly and honestly feel, I share the opinion of Judge Frank of our circuit who has repeatedly said that that has no impact on the jury at all. They know what is taking place, they have heard it and it [6144] is in their minds, and you can strike from now till doomsday; they just won't listen to you. But of course the defendants have their rights for whatever value it may have against eventualities to place on the record that which they think the denial of which would constitute reversible error.

* * *

[6148] The Court: So that 35, 36, 37 and 38 will also be reserved for later discussion.

Now the next exhibit would be Government's [6149] 39, which is the certificate of incorporation of Kirby & Kirby.

Mr. Kiendl: We move to strike on general grounds.

Mr. Bender: The same motion.

Mr. Goldstein: The same motion, your Honor.

The Court: What about that, Mr. Bauman?

Mr. Bauman: It seems to me that Kirby & Kirby, as your Honor will remember, were the recipients of some of these commissions.

The Court: Yes.

Mr. Bauman: And if we come to the conclusion that the commissions are properly in the case as background material, although in fact the amount is now excluded, that seeing who Kirby & Kirby was is likewise is proper background material in determining the formation of this later conspiracy and perhaps as bearing upon the defendant Klein's wilfulness in that connection.

The Court: No, I don't think I can buy that, particularly in view of the fact that Kirby & Kirby was dissolved before June the 1st of 1946—oh, I am sorry. I am wrong.

Mr. Bauman: No, sir.

[6150] The Court: That was in January 1947 that it was dissolved.

No, nevertheless I am not disposed to retain that in and the defendant's motions to strike Gov-

ernment's 39 and 40—I am assuming they so move with respect to 40.

Mr. Kiendl: Quite right.

Mr. Bender: Yes, your Honor.

The Court: I will grant it.

* * *

[6155] The Court: I believe that the next exhibit to invite our attention would be that of Klein's Exhibit AI which was received at page 1250 and that was a transmittal letter from Williams to Ramsey Scott with the Chase Bank $200,000 letter of credit which was enclosed. That was originally received as to all defendants except Roer.

Mr. Kiendl: Defendant Klein moves to strike it on the same ground.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin moves to strike that, your Honor.

The Court: Denied.

* * *

[6159] And the next exhibit is Defendant Klein's AN, received at page 1306, representing certain credit memorandum from Agencias to R. C. Williams.

[6160] Mr. Kiendl: Defendant Klein moves to strike them all out on the ground that it is no longer material to any issue in the case.

Mr. Bender: The same motion.

* * *

[6160] Mr. Donohue: Defendant Alprin moves to strike it out, your Honor.

The Court: Well, it would appear to me that if invoices were admissible in the background, credit invoices would be likewise admissible, and under those circumstances the motions will be denied.

* * *

[6173] The Court:

* * *

[6173] Now we come to one I believe that you want to be heard on, and that is a translation of the certificate of incorporation and the by-laws of Agencias Destiladores, S. A., dated January 26, 1944, Klein's AU received at page 1890.

May we first ask for an expression from the [6174] defendants on the record.

Mr. Kiendl: We move to strike that, if your Honor please: It doesn't come within the orbit of your Honor's restriction as to the general activities of the parties.

Mr. Bender: The same motion.

Mr. Donohue: I so move to strike.

Mr. Bauman: The Government objects to the striking of this exhibit for the reason that in talking about the background of the fifth count in this case it seems to me that the operation of at least the formation of these seventeen corporations, and certainly their financial operations during the period referred to in the fifth count, that would not necessarily be background, the financial operations during the June 1st period.

The Court: I don't think you have to labor it. I am going to deny the motions to strike. I do feel that the formation of any of these corporations in the syndicate may properly be in the area of the general background.

Now the next exhibits received on the record were Klein's F1 and G1 at page 1907; and you may recall that those were the cables from Agencias to [6175] Williams constituting in each instance the sender's copy of the cable, the receiver's copy having heretofore been admitted in each respective case as Klein's F and G.

Mr. Bender: Right.

The Court: Now Klein's F and G, if I correctly recall,—yes, I denied the applications to strike them because they were the cables having to do with the initial hundred thousand or the returning of the signed copy of the agreement Government's Exhibit 4.

Mr. Meagher: That is right.

Mr. Bender: Yes.

The Court: And accordingly it will be deemed that motions made by the defendants to strike F1 and G1 have been made and those motions are denied.

* * *

[6176] Mr. Kiendl: If your Honor pleace, may we backtrack for one minute for one purpose?

The Court: Yes, surely.

Mr. Kiendl: We moved to strike out Klein's Exhibit AT, the certificate of incorporation of Clayton & Childs. Your Honor granted that motion.

— The Court: Yes.

Mr. Kiendl: Then we moved to strike out the certificate of incorporation of Agencias Destiladores and your Honor denied that motion.

The Court: Yes.

Mr. Kiendl: If the Agencias certificate of incorporation is to stay in we would like to keep in the certificate of incorporation of Clayton & Childs.

[6177] The Court: All right.

Well, my reason for that, as I recall it, was that the Government voiced no objection to the striking of Clayton & Childs but then did as to Agencias.

Mr. Kiendl: I can understand why the Government didn't object to that.

The Court: Yes.

Now would you be good enough to give me the number of the Clayton & Childs certificate of incorporation?

Mr. Bender: AT.

* * *

[6178] The Court: Yes.

All right, then, Defendant Klein's AT will be received—let me put it this way—that is deemed stricken out and the record will read that the motions of the defendants Haas and Alprin to strike defendant Klein's AT are granted, it being understood that the defendant Klein does not move to strike Defendant Klein's AT.

Mr. Kiendl: Fine.

[6178] The Court: Now Klein's AV for identification [6179] was not offered and that brings us then to Klein's Exhibit AW, a group of shipping documents headed by a letter from Duncan Harwood to Agencias, dated July 27, 1944 covering Harwood whiskey received at page 1917.

* * *

[6179] Mr. Kiendl: Defendant Klein moves to strike that and all similar groups of shipping documents that were offered in evidence in connection with the first four counts on the ground that they are not material [6180] or within the orbit of your Honor's ruling as to the general activities of the parties prior to June 1st, 1946.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: A similar motion, your Honor.

* * *

[6183] The Court: I think the jury should have somewhere or other—and this bases the first opportunity—the mechanics of just what happened to accomplish a shipment of a carload [6184] of whiskey, and I think this is one of the ways in which it can be established.

* * *

[6193] The Court: No, I am afraid I can't buy it. I think that these documents representing the modus operandi, at least one set of them should

be admissible in order to instruct the jury about the general method or procedure, but it shouldn't be with Klein's AW in my view. So that if I have indicated to the contrary I am reversing myself—I don't recall what I said [6194] on the record—but, in any event, if I have indicated that with respect to Klein's AW the motions to strike would be denied, I am changing that ruling now and granting the motions to strike Klein's AW.

And Klein's AX would be merely cumulative and I would prefer to have the first shipment as evidenced by Klein's AY as the sample upon which I will deny the motions to strike.

So that Klein's AX which would merely be cumulative, the motions to strike that are similarly granted.

Mr. Bender: And as to AY, your Honor.

The Court: I haven't come to that yet.

Mr. Bender: All right.

The Court: Remember, we are taking these in the order in which they were received in evidence.

Mr. Bender: Yes.

The Court: Not in the alphabetical order.

Now the next one, received at page 1930, is Klein's AY, and on that, if the motion is made to strike, and I assume it is, by all defendants, I am denying that motion because that to me would appear to be the classic group of papers to indicate to the jury the [6195] method of the various commercial documents involved in these documents that

went of course at the inception of the trading from Canada to Cuba.

* * *

[6198] The Court: And brings us now to defendant Klein's BG, which is the agreement between Duncan Harwood and Agencias, dated February 1, 1944, appointing the latter its exclusive agent for distribution of Harwoods throughout the world. As part of the general background, I would overrule, as I do, the motions to strike.

Mr. Bender: I take it the same ruling as to its admissibility, though, it continued.

The Court: Oh, Yes.

Mr. Bender: In other words, it is not admitted as to Haas at all, because it was not originally, and certainly should not be as to the fifth count. There is one other I think in the same category and that was AY, and I assumed it was on that basis.

The Court: Yes, that is what I was just thinking about.

Yes, the answer to your question is "Yes."

* * *

Motions to Strike Exhibits and Rulings Thereon

[6203] New York, June 30, 1955,
10 o'clock a.m.

Trial resumed.

(Discussion off the record.)

The Court: While you were sitting up all night I was thinking very hard about the problem that assailed us yesterday, and had some research on it, but in any event I came up with a determination which I suspect will make the defendants very unhappy, but nevertheless this is it:

During the Government's case certain exhibits were received in evidence offered by the Government or by a defendant. At the beginning of this trial the Court announced a pattern or technique to be followed in ruling on the admissibility of exhibits and oral testimony that would confine the admission thereof to only such defendants as were indicated to have had some connection therewith. This pattern was abandoned on a few occasions because of necessity.

At the end of the Government's proof ~~all five~~ [6204] defendants on trial under the first four counts and three of them on trial under the fifth count moved for judgments of acquittal on all counts. These motions were granted as to the first four counts and denied as to the fifth.

The three defendants still remaining on trial under the fifth count are now engaged in a series of motions to strike out exhibits and will similarly move to strike testimony received during the Gov-

ernment's case. These motions pose problems immediately requiring resolution. Such problems are in measure illustrated by Defendant Klein's Exhibit AY. This is a sheaf of documents sent by the distiller to the Canadian Purchasing Corporation in June, 1944, in connection with the first shipment of whiskey under the contract between them previously entered into about four months earlier. The Government did not introduce that exhibit. The defendant Klein did; and undoubtedly to prove, together with other evidence, that the activities of the Cuban Purchasing Corporation were real corporate functions and not the sham which the Government charged that corporation to be under the first four counts.

For a like reason defendant Alprin offered no objection thereto. On the other hand defendant Haas [6205] was sustained in his objection.

Those rulings were under the pattern set down by the Court as aforesaid. There was of course no objection by Klein, he having offered his Exhibit AY. Had he not and had the Government offered it and Klein objected his objection would have been overruled because of its obvious connection with the transaction manifested by the exhibit. Had Alprin objected as did Haas Alprin's objection would at that stage have been sustained as was Haas'. But Alprin, for the obvious reason above stated, did not and defendant Klein's AY was not excluded as to him.

Now, Klein, Haas and Alprin move that it be stricken out as no longer having any probative value in the case because the first four counts of the indictment for disproof of which it was introduced are no longer in the case.

Inasmuch as it came into being long before the beginning, June 1, 1946, of the conspiracy charged in the remaining fifth count, it cannot remain as proof of the conspiracy therein charged. It may otherwise be relevant to inform the jury of the events and relationships of the parties involved in the fifth count as what has in this trial been variously called background or atmosphere [6206] or climate facts (United States v. Witt, et al, 215 Fed. 2d., 580, at 583).

To enable the jury to understand what preceded the alleged conspiracy in order to intelligently approach the question of the existence or not of that conspiracy, on that basis, and confined solely to that purpose, it has relevancy and should remain in the case.

[6207] But if the pattern or technique of determining admissibility is to endure as to whom is it admissible? It having served its purpose of contributing to his directed acquittal on the first four counts Klein, and Alprin for like reason, now disown it and join Haas as to whom it was excluded originally in moving to strike it out. Had defendant Klein's Exhibit AY come into existence after June 1, 1946 I believe its admissibility as to all defendants would be clear under United States v. Dennis, et al,

183 F. 2d 201 at 230 affirmed 341 United States 494. That it came into existence before the date upon which the conspiracy charged in the fifth count is said to have had its inception does not alter its admissibility. Limited solely to its purpose of supplying the jury with the picture as it existed on June 1, 1946 it must be necessarily received to enable the jury to intelligently approach a determination of the issues raised by the fifth count. It therefore must be received as to all three defendants regardless of its treatment earlier in the case and another posture it does not follow that having served its purpose as ot the first four counts it may not be additionally or independently [6208] admissible for a different purpose as to Count 5. I fail to discern where its reception for the definite and limited purpose stated can in anywise prejudice the defendants for in that aspect it cannot be said that the jury will consider it as proof of the conspiracy charged or a participation by any defendant therein. Its admissibility becomes necessary for the purpose stated regardless of the lack of apparent connection between any defendant and the exhibit.

In announcing the pattern under which proof would be received the Court stated that such technique would prevail until the Court believed that a conspiracy could be rationally found from the evidence already adduced. In order to avoid any suggestion thereof to the jury the Court had hoped that the pattern prevail until all proof was in and that the jury would then be instructed that regard-

less of the exclusion of evidence during the trial if they found a conspiracy and the participants therein evidence received as to any defendant found to have participated could then be considered against all defendants found to have participated. By the denial of the motions for judgment of acquittal on the fifth count the Court has in essence expressed the belief that [6209] enough was adduced upon which a reasonable person could conclude that the conspiracy charged in that count occurred. There is accordingly no inconsistency in now holding that defendant Klein's AY is admissible as to all three defendants.

Treating therefore with the several motions to strike it, one, Klein's motion is denied. Two, Alprin's motion is denied. Three, Haas' motion is denied. And should Haas, against whom it was originally excluded, withdraw his motion in the hope of remaining in status quo the Government will be permitted to immediately offer it de novo as to him.

While defendants are expected to preserve their rights by moving on the record to strike exhibits and testimony the determination of those motions will be upon the basis recited above respecting the motions addressed to defendant Klein's AY. Upon the assumption that the Government avails itself of the opportunity of reoffering as against defendants as to whom they were heretofore excluded the exhibits passed upon yesterday—and I now ask the District Attorney if he does.

Mr. Bauman: I so do, your Honor.

[6210] The Court: And upon the basis above stated as to the defendant Klein's AY the following exhibits considered yesterday are now received as to all defendants:

Government's 1, 2-A and B, 8, 3, 4, 5, 6, 7, 9, 10, 11, 12, 24, 25, 29, 28, 13, 15, 16, 17, 18, and 21.

And Defendant Klein's Exhibits E, H, G, F, J, K, R, S.

Mr. Bender: Alprin's R.

The Court: You are right. That should be Alprin's R and I believe S was Roer's.

Mr. Bender: Alprin S.

The Court: Alprin S?

(Mr. Bender nods.)

The Court: And Klein's AI, AN, AT, AU, F-1, G-1, AY, and BG.

And on that basis, gentlemen, we will continue now with the receipt of motions to strike out the various exhibits following which we will consider oral testimony.

[6211] Mr. Donohue: May I simply ask one question, may it please your Honor, in the light of your Honor's ruling that the documentary evidence referred to is admissible to the jury only for the purpose of showing background atmosphere or climate——

The Court: That is documentary evidence admittedly having its conception prior to June 1, 1946.

Mr. Donohue: May I inquire if it be necessary in order to prove, for example, that there was a contract and a supplemental agreement between Agencias and R. C. Williams, that it be necessary to go into the questions of fact which of necessity would arise if your Honor introduced the O. P. A. agreement, 2-A and 2-B, the drafts of the agreement, because then it creates a question of fact as to which came first and why, when it would appear to me that for the purpose of informing the jury as to the background it is only necessary for the jury to know from the document that there was ultimately an agreement and a supplemental contract. If we are going into the question as to whether the agreement and the supplemental contract were drawn pursuant to the Haas opinion or independent of the Haas opinion, are we not creating issues of fact which could not possible relate [6212] to background but which go only to prove, if proof be, of a conspiracy set out in the fourth count and the aiding and abetting set out in the first three.

The Court: Well now, let us look at these exhibits again, those that the Court has indicated should be received. Government's 1 is the O. P. A. price order.

Mr. Donohue: Yes, your Honor. The contract recites the fact that there was an O. P. A. price order which was approved, on the basis of which the contract was prepared. The jury certainly knows by reading the contract that the contract would not have come into being had it not been that there was

an O. P. A. ceiling which permitted a price of $19.05, whatever the price may have been.

The Court: In other words, I take it that the contract being admitted your position is that everything prior thereto ought to be excluded?

Mr. Donohue: Yes. Otherwise, for example, if your Honor permits 2-A, 2-B, and the supplemental agreement and the agreement, it would then become necessary for me through Mr. Alprin to rehash all the proceedings and the meetings with Mr. Jacobs to prove whether or not it was Alprin or Jacobs who decided [6213] that the supplemental agreement should be drawn out of the original contract or the original draft; it would be necessary for me through Mr. Alprin to prove whether or not the Haas opinion of April 17th could have been the reason for separating the contract, in the light of the fact that Jacobs had written the letter on April 13th pointing out—those are questions which I think—of evidence—which would then become necessary, which would bring before the jury the inference that Mr. Alprin was an important factor in preparing this contract in the light of the Haas opinion, attempting to prove a conspiracy cited in the fourth count of the indictment; whereas if before the jury there is only the consummated contract and the supplemental letter——

The Court: 4 and 5.

Mr. Donohue: —4 and 5; with the correspondence, if necessary, between Alprin and Jacobs to show that it was Alprin and Jacobs who as counsel

for their respective clients negotiated and prepared the contract—we know the jury know it anyway; but I think if these exhibits are introduced of necessity the defendants, perhaps even Mr. Klein, may have to testify as to which of these meetings he attended, whether it was [6214] his suggestion that the supplemental agreement was separated from the terms of the original contract. And we are right back to trying over again the fourth count.

My humble suggestion to the Court is, if you put in the final agreement, that you put in the supplemental contract showing the background out of which the whiskey was sold and whatever moneys were earned were earned in accordance with it.

The Court: What about that?

Mr. Bauman: Well, while at first blush that seems reasonable, it seems to me, and I think Mr. Donohue has picked a perfectly good example to talk about, because I think these negotiations among Jacobs, Koerner, Alprin and Mr. Klein are part of the background facts, and what happened in those negotiations, what happened even with relation to what Mr. Alprin is supposed by Mr. Jacobs to have said on that occasion, what happened with relation to splitting the agreement into two parts, Mr. Klein's participation in such conversations are admissible it seems to me not only as background facts, but within the language of the cases as bearing on the intent and the motive in connection with the acts undertaken in the fifth count, [6215] the con-

spiracy. Now those facts, sir, I respectfully submit, under the cases, even though they predate the conspiracy and indeed——

The Court: Well, that is what the Witt case holds.

Mr. Bauman: Exactly, that is what the Witt case holds.

The Court: The testimony with respect to an alleged fix, as Judge Frank calls it, of an internal revenue agent that antedated the alleged conspiracy by a substantial period he says are admissible on the question of intent.

Mr. Bauman: That is precisely my argument with relation to the testimony to which Mr. Donohue has referred and relates to a good deal of Jacobs' testimony particularly in these preliminary negotiations. It is admissible, sir, I respectfully submit on the ground of background, and it is admissible on the ground set forth in the Witt case.

Mr. Donohue: Your Honor, I respectfully call your Honor's attention to the fact that I thought I understood your Honor to say that the crime charged in the fourth count and the crime charged in the fifth count were dissimilar offenses.

[6216] The Court: That is right.

Mr. Donohue: Which certainly would not bring it within the contemplation of the case wherein proof of a prior crime might have been admitted for the purpose of showing intent. But I am happy with Mr. Bauman's statement on the record because it confirms my certain opinion of yesterday that while

your Honor might continue to delineate, as you did so clearly again this morning, that your purpose in admitting this evidence was only for the purpose of background or atmosphere, that Mr. Bauman is quite satisfied——

The Court: I intend to limit it to that.

Mr. Donohue: He would never be satisfied——

The Court: And instruct the jury that anything occurred prior to June 1, 1946 is received for that purpose and that purpose only. Mr. Bauman points out, if I may interrupt you——

Mr. Donohue: Surely.

The Court: Mr. Bauman points out that it may be receivable on a different basis entirely in connection with the fifth count. That I haven't passed upon. But he says that even if I were to say, well, it is not part of the background, and he says it is, and frankly I am disposed to agree with him, but he says even if you say it is not part of the background [6217] that there is another reason why it should come in, and of course there again you have the parallel of what I pointed out this morning with respect to AY. The mere fact that it served his purpose as to the first four counts does not necessarily mean that it cannot serve another purpose with respect to the fifth count.

Mr. Donohue: I am not talking about such testimony.

The Court: I know that. I say there is a parallel. Mr. Bauman says that even if the events that led up to the main supplemental agreement, Government's 4 and 5, are not to be received merely as background

climate or atmosphere facts, that they may be receivable on the question of intent.

Now I misspoke myself when I said that the Witt case held that. I won't say that it didn't. But as I think about it the second time I think that all the Witt case held was what I attributed to it this morning, namely, that that stuff could be brought in as background material. Now, whether it went so far as to say, and there is a likelihood that it did, that under the peculiar facts of that case that background material was indicative of intent is another matter.

Now, whether the negotiations leading up to [6218] Government's 4 and 5 could fairly be said to be indicative of intent to evade, or, rather, to defraud the Government in the exercise of a governmental function by a conspiracy commencing June 1, 1946, I am disposed to think is very, very doubtful. Mr. Bauman, and I correct my remarks to that extent. But, nevertheless, that would leave us then with the sole proposition as to whether this proof should remain in as background material, and Mr. Donohue argues that as such it is unnecessary because the contract is the starting point, but I have defined background material as including also the relationship of the parties. And if the jury were to be able to stand in a corner and not think about a pink elephant on my instructions and to completely erase from their minds everything else, they would be deprived of the background material of Alprin's very definite connection with this deal in its incep-

tion and the drawing of the agreement and the negotiations and so forth. Now if that involves our having to go through the additional testimony on the defendants' case to explain away whatever inferences may occur by that remaining in, I am afraid that is just what will have to happen.

But I accept the Government's rationale that [6219] this properly is within the scope of the background material.

Mr. Donohue: May I respectfully say, for the purpose of the record, if it please your Honor, that it is the obvious purpose of the Government in introducing this type of background material to attempt to prove by evidence which would be clearly admissible with respect to the fourth count that the defendant Alprin was a part of the conspiracy to evade the taxes of the defendant H. H. Klein, for the purpose of establishing either intent or motive, for the purpose of indicating that therefore he might well be guilty of the conspiracy charged in the fifth count; by establishing the facts that would have supported the fourth count he is attempting by the device of background to prove a purpose and intent on the part of the defendant Alprin to violate the offense set forth in the fifth count.

And for the purpose of the record we specifically object to the offer of evidence for that purpose, so that we won't have to repeatedly object when it comes before the jury.

The Court: I am put in this position of sustaining your objection because I don't agree with

you [6220] on the proposition that this evidence is now being received to establish it under the fifth count for the purpose for which it would have served as to the fourth. In other words I think you are quite right that under the fifth count he cannot introduce evidence that would be addressed solely to proof of the conspiracy to evade H. H. Klein's 1944, '5 and '6 taxes. I completely agree with you on that.

Mr. Donohue: But I can't see, if it please your Honor, how evidence with respect to the circumstance under which this contract was negotiated, and I am directing my attention now particularly to the question as to whether or not the Haas opinion was responsible for the separation of the contract, testimony by Jacobs as to whether or not it was Alprin who suggested, as a tax maneuver or for tax reasons or as a tax situation, that the contract itself be divided into two aspects or two parts, which obviously could prove only, if it could prove anything, that Alprin played the part in the creation of a scheme to establish sham corporations for the purpose of evading income taxes due the Government from the defendant H. H. Klein.

The Court: I say with equal force that it might establish the fact, although I am not even [6221] receiving it for that purpose and will carefully instruct the jury, if properly reminded by a request to charge by the defendants, that anything that occurred, unless I get a specific request to the contrary as to a specific bit of evidence from the Government,

and then I will pass upon that peculiar evidence—but my present intention is, and I think I made it clear this morning, that anything that occurred prior to June 1, 1946, is only to be received by the jury so that they might have an understanding of the background that gave rise to the alleged conspiracy, and that anything received that had its genesis prior to June 1, 1946, is not to be considered by them as establishing a conspiracy on and after June 1, 1946.

Mr. Donohue: I have the greatest confidence in your Honor's capability of so doing.

The Court: But you say that it won't have that effect.

Mr. Donohue: I think it is totally impossible, if it please your Honor, to admit these controversies which in my humble judgment, and I think your Honor agrees, could have no bearing whatsoever in proving the allegations in the fifth count, that the jury can find that these were introduced only as background material [6222] and not as my distinguished adversary says for the purpose of showing their intent and motive to commit the offense charged in the fifth count. And having stated my opinion and not wanting to prolong the discussion, I will end it.

The Court: All right.

Mr. Kiendl: May I join in what Mr. Donohue has said?

The Court: Yes.

Mr. Kiendl: And may I add my thought about this whole situation. While I am not unsympathetic

with your Honor's attitude in permitting the jury to get what you just said, an understanding of the background of this alleged conspiracy after June 1, 1946, we must be exceedingly careful, after three months of trial, that that not be converted into an attempt on the part of the Government by the back door method to prove the first four counts and to argue to the jury about the first four counts.

[6223] For that reason, while we are sympathetic with your Honor's position as to background, we think instead of being unlimited in scope, the Court should restrict it and restrict it to the very minimum—just enough to give the jury a general picture of the relationship of these parties and the nature of the business that they were conducting.

Now going into the issues as to whether or not the agreement was negotiated at arms length, whether or not Mr. Klein said it looked better if it went in two parts instead of one, and all those issues, we submit has made it literally impossible for these defendants to get a fair trial before this jury after the mountains of evidence that have been introduced here by the Government in support of the four counts concerning which your Honor has ruled that the defendants are clearly entitled to an acquittal.

The Court: Well, I will go to this extent, I will take it under advisement, gentlemen, and consider it further.

I understand the position to be, in summary, that background—so-called background atmosphere

[6224] or climate facts should be limited to the basics, i.e., the two agreements, and then the transactions or dealings thereafter without permitting the inclusion of the forerunners to Government's Exhibits 4 and 5.

While my present disposition on the record is to allow them to remain, I will consider it further, gentlemen.

Mr. Bauman: May I just——

Mr. Bender: Excuse me, may the defendant Haas likewise join in what Mr. Donohue and Mr. Kiendl have said?

The Court: Yes.

Mr. Bauman: May I state for the record, your Honor, that I have no purpose in attempting through any back door method or any other method to retry those counts which your Honor has dismissed. I recognize my responsibility is to try the fifth count and the fifth count alone, and that is what I propose to do.

Now with relation to any other possible uses on this testimony at the proper time, I expect to submit a memorandum to your Honor to attempt to convince your Honor that certain of this evidence is available legally for another purpose. That [6225] determination will be made by your Honor, as you have every other question that has arisen here, but these constant accusations of my desire to retry the first four counts in a back door way, I just want to state once and for all is not so. I do not propose to do that and I hope to conduct the remainder of this trial for the prosecution in accordance with

what I know my responsibilities to be in the trial of the fifth count and the fifth count alone.

The Court: Of course you understand that while you may have no intention, if the ultimate effect is that on the jury, regardless of your intention, that is the aspect that has to concern me as the judge rather than you as the advocate.

In any event I will continue to consider those exhibits that led up to Government's Exhibits 4 and 5, and at the conclusion of our consideration of these motions to strike, I will finally resolve it one way or the other.

* * *

[6227] The Court: Now, then, gentlemen, Defendant Klein's Exhibit BH invites our attention, appearing at page 1950 of the stenographer's minutes—a letter dated May 8, 1944 from Agencias, signed by de Cubas, to Duncan Harwood in Canada, advising Agencias had informed Williams that the latter could communicate directly with Duncan Harwood with relation to shipments [6228] of Harwood whiskey.

Mr. Kiendl: Defendant Klein moves to strike it on the general grounds.

Mr. Bender: The defendant Haas joins in that motion.

Mr. Donohue: The defendant Alprin moves to strike.

Mr. Bauman: The Government opposes and moves the reception of the exhibit in evidence against all defendants.

* * *

[6228] The Court:

* * *

[6229] The motions to strike by defendant Klein are denied; the motions to strike by Alprin are denied, and the motion to strike by Haas is denied, and the Government's motion that Klein's Exhibit BH be received as to the defendant Haas is granted. * * *

[6230] Mr. Kiendl: We do not move to strike Klein BJ.

The Court: All right. Klein's BJ will [6231] remain as to Klein.

What about Haas?

Mr. Bender: Well, as far as the defendant Haas is concerned on the fifth count, your Honor, I have to take the position that BJ is certainly not pertinent to his participation in the alleged charge. I can't see it even being admissible as to him as background or anything else. So I have to move to strike out.

Mr. Donohue: The defendant Alprin moves to strike.

Mr. Bauman: The Government moves its admission against the defendants Haas and Alprin.

The Court: The motions to strike are denied and Klein's BJ will be received as to all defendants. And I assume that the position stated by each had to apply also to BK which was included in Mr. Kiendl's statement.

Mr. Donohue: Yes, your Honor.

The Court: There will be the same ruling on that.

* * *

[6232] The Court: The next would be Klein's BM, which is a certificate by Dr. de Cubas, acting secretary of Agencias certifying to the adoption of a resolution on September 6, 1944 for the opening of a bank account by Agencias in the Chase National Bank in New York.

Mr. Kiendl: Move to strike that out as not material on any theory as to the fifth count.

Mr. Bender: The same motion.

Mr. Donohue: I move to strike on behalf of the defendant Alprin, your Honor.

Mr. Bauman: The Government moves that the —let's see. BM was previously received as to Klein and Alprin.

The Government opposes the striking of this exhibit and moves for its admission against the defendant Haas.

[6233] The Court: Well, now, that puts us back in the same problem or puts us back in the position of considering a problem parallel to that which involved the invoices. We finally came to the conclusion that one set of invoices to demonstrate the dealings of the parties would have been sufficient. Now do you intend to offer all of these bank accounts under the fifth count?

Mr. Bauman: Yes, sir, and may I state my position?

The Court: Yes, I would like to be informed on what theory they fall within what I think I have demonstrated to be my definition of "background."

Mr. Bauman: Well, I think these are especially

important background because the fifth count, which has been discussed in great detail and which I need not repeat, would envisage, it would seem to me, the banking transactions in the handling of this money, Judge.

The Court: Now what does the Government say—and I would like to refresh on it; I have stated a couple of times what I believe the Government is attempting to claim under the fifth count—but now that we have gotten everything else out of the [6234] way let's have a soul-searching reappraisal on that. Just what does the Government maintain it charges under the fifth count?

Mr. Bauman: The Government maintains it charges under the fifth count a conspiracy to hide and secrete for a criminal purpose the proceeds of that part of the Harwood whiskey deal which were manipulated for purposes of secreting and throwing sand in the Government's eyes from June the 1st, 1946 on. And as part of that, sir, the Government would charge—and I will particularize if you would like to know what I have in mind——

The Court: Yes, I would.

Mr. Bauman: From that time forward—and I stated this in my argument on the motions the other day—from June 1st, 1946 on Klein with a purpose, as I said, of throwing sand in the Government's eyes did certain things to impede the Government in assessing and in collecting its revenues, the revenues due from him and others under the fifth count.

Now, for instance,—and I will give you a number of instances that occur to me offhand—Klein's ac-

tions in transporting $8,000,000 under [6235] the circumstances which he did from New York to Canada, and indeed it was in that period that considerably more than $8,000,000 was transported out of the United States, the Government claims, to impede, for the purpose of impeding the Treasury Department in the collection of its revenue; the handling of the drafts about which we have talked so many times; and their reporting as capital gain ultimately by Roer, Alprin and Koerner is likewise in the Government's view a part of the fifth count. The rewriting of the Tivoli book is regarded in that category. The making of various entries in the Tivoli book. The rewriting of the Regan Potter book as contested by the Government. It is difficult to put it in one sentence but what I am trying to explain to the Court——

The Court: I am following you.

Mr. Bauman: What I am trying to convey to the Court is my theory that anything that Klein did or any of the co-conspirators did to defraud the United States from June 1st on by impeding them in the collection of their revenues including, if the Court please, the making of statements to Internal Revenue officials made for the purpose of impeding that [6236] agency in the collection of its revenues the Government contends is admissible under the fifth count.

Now I hope I have answered you.

The Court: Yes, I think you have. I see Mr. Bender shaking his head. He may not agree that

the Government has the proof to establish these things but I think he ought to at least admit that he understands what the Government's contention is.

Now there was a time in this trial when he confessed that he could not make head or tail of the fifth count. Now I asked him can be make head or tail or head and tail of the fifth count in view of Mr. Bauman's statement.

At least now, Mr. Bender, will you profess to have at least an understanding of what the Government says the fifth count is supposed to charge?

Mr. Bender: I would like to say this, your Honor: That I did take the position before your Honor ruled on the motions that I didn't understand the fifth count and I thought it was vague and for that reason unconstitutional. When Mr. Bauman started off again now I felt exactly the same way. But then I began [6237] to see as he talked more about what he considers the fifth count to be that he is in effect charging exactly what is charged in the fourth count. And for this reason: You recall in his memorandum of law that he submitted to you and in his arguments he said that the conspiracy there was a conspiracy to attempt to evade taxes of the people named by concealing, by misleading, by in their statements given to the Bureau of Internal Revenue from hiding, from secreting—everything that he has said that he wants to put in evidence on the fifth count he put in as admissible on all of the counts.

Now I would like to go one step further.

The Court: For a limited purpose.

Mr. Bender: He never limited it, your Honor

The Court: In my mind there is no doubt about the limitation. In connection only with the attempted evasion by Klein of the 1944, 1945 and 1946 taxes

Now the very same facts may in my view constitute proof if believed by the jury beyond a reasonable doubt of an entirely different motive, i.e., an attempt to obstruct, impair, impede, blind, throw sand or dust in the Government's eyes, prevent [6238] the Government from ascertaining a source from which income tax should be reckoned. And I in my mind—it has taken me a little time, I'll confess it—but at least I believe—and of course you as the advocate I am not calling upon you for a comparable confession—but I believe that I now recognize the distinction, more so since I worked on the motions for judgment of acquittal. And it was on that very distinction that I refused to acquit on the fifth count. I recognize that the Government—I won't say inartistically or inartfully because I have come to an understanding—that the Government charges a different crime in the fifth from that charged in the fourth and that the fourth was hinged upon the first three but the fifth was not.

Mr. Bender: I think I can say this to your Honor and ask you——

The Court: And if you ask me I'll answer you if I can.

Mr. Bender: And of course I do this with the greatest respect.

The Court: Of course. I appreciate that.

Mr. Bender: In my view of it every conspiracy [6239] to attempt to evade a tax by concealment is an impeding and an obstruction of the revenue. It's one and the same thing. What the Government did here with the fifth and the fourth count is this: Was to take the means by which it could charge a conspiracy to attempt to evade the taxes of the defendants and pull them out under the fourth count where they could have been and put them under the fifth count.

The Court: Well, by what you have just said it seems obvious to me that you have answered the Court's question. While you may disagree and argue against it apparently you do now at least understand what the Government's claim is as to the fifth count.

Mr. Bender: No.

The Court: You don't?

Mr. Bender: I say this, your Honor——

The Court: Well, I didn't propose to become embarked on the side arguments so let us abandon it. I do understand it—at least I think I do.

Mr. Bender: I only want to say that my only purpose in my arguing with you about this and discussing it is that I think your Honor has indicated [6240] enough in this trial that if you were convinced by anything that we could say that the fifth and the fourth counts are one and the same I don't think there would be the slightest hesitation in your mind of reversing yourself on the——

The Court: Oh, you can bet your bottom dollar on that. And you can also bet your bottom dollar in the fact that you would have an awful time convincing me that they are one and the same. I am persuaded pretty definitely in my mind that they are not.

However to get back to the exhibit that we are considering.

Mr. Bauman: That is what I wanted to address myself to once I had answered your Honor's question.

Mr. Bender: Now having this in mind, your Honor.

The Court: Let me just inject this, Mr. Bauman.

Mr. Bauman: Yes, sir.

The Court: I addressed a question to you that was unfair. I asked you whether you intended to get in all of these bank accounts. Now I notice that Defendant Klein's BM is not a bank account.

[6241] Mr. Bauman: It's a resolution.

The Court: It's a resolution to open a bank account.

Mr. Bauman: That is right.

The Court: On that basis, while I had in mind the fact that certain transactions in certain bank accounts might become relevant as part of the conspiracy charged in the fifth count, at least to the extent that an account was opened, I think that that is properly within background material, and so the motion of the defendant Klein and the motion of the defendant Alprin to strike Klein's Exhibit BM

are denied, and as to Haas in the Government's application that it be received as to Haas, that is granted.

And so Klein's BM will remain in the case as an exhibit against all defendants.

* * *

[6242] The Court:

On page 1988 of the minutes, Klein's Exhibit BQ, a translation of the certificate of incorporation and by-laws of Compania Ramsey Scott Exportadores S. A.

[6243] Mr. Kiendl: Defendant Klein moves to strike.

The Court: That is dated October 12, 1945.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Donohue moves to strike, your Honor.

Mr. Bauman: The Government opposes those motions and moves the introduction of the exhibit against the defendant Haas presently, being in evidence against the defendant Klein and Alprin.

* * *

[6244] The Court: Well, as to Defendant Klein's [6245] Exhibit BQ, the motion to strike by the defendant Klein is denied.

The motion to strike by the defendant Alprin is denied.

The motion to strike by the defendant Haas is denied.

The Government's motion that the exhibit be received as to all defendants is granted.

* * *

[6246] The Court: What I intend to tell them is that these documents now received against all these three defendants that are dated—or the events that are testified to that occurred prior to June 1, 1946, are to be received and considered by them only as historical background of what occurred, or to establish the relationship of the parties, if they believe it to have occurred in that manner, and for no other purpose, and is not to be taken by them in determining whether a conspiracy commenced on June 1st, 1946.

* * *

[6247] The Court: Now Klein's BR, which was received as to Klein and Alprin at page 1996 of the record is the certificate dated December 9, 1945 authorizing Klein as president and treasurer of Ramsey Scott to open a bank account in the Chase National Bank, and a certificate of resolution authorizing the officers of Ramsey Scott to open a bank account in the Royal Bank of Canada in Montreal, and a certificate of resolution dated February 4, 1946 authorizing Klein as president and treasurer to open bank accounts in Havana and elsewhere for Ramsey Scott, and a copy of a resolution of Ramsey Scott dated January 28, 1947 authorizing Klein as authorized signatory with power to sign checks, drafts or orders on certain banks.

Mr. Kiendl: Defendant Klein moves to strike them all out, not admissible on any theory.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, [6248] your Honor.

The Court: The motions of the defendants Klein and Alprin are denied.

The motion of the defendant Haas is denied.

Mr. Bauman: May I move that they be received as to the defendants Haas and Alprin?

The Court: Well, your motion should address itself only as to Haas because it was originally received as to Alprin.

Mr. Bauman: Well, I am sorry, your Honor —oh, you are right. I was looking at the wrong note.

The Court: That motion is granted, and Klein's BR will be received as to all defendants for the sole purpose of indicating the nature of the relationship of the parties prior to June 1, 1946.

* * *

[6249] We come now to Klein's Exhibit BS which was received on page 1999, and that is the minutes of a stockholders' meeting—meetings of Ramsay Scott containing a resolution to open bank accounts in the Bank of Montreal and the Canadian Bank of Commerce.

Mr. Kiendl: We have the same motion as to that.

The Court: Klein's motion is denied.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

The Court: Alprin's motion is denied.

Haas' motion is denied.

This was received originally as to Haas.

Mr. Bauman: Government moves it be received as to the defendant Haas.

The Court: Granted.

* * *

[6250] The Court:

* * *

Klein's BU, the minutes of a directors' meeting of Ramsey Scott held December 31, 1946 at which a resolution was adopted to open a bank account in the Royal Bank of Canada and the Royal Bank of Nova Scotia, at which officers were elected and directors were elected.

Now my notes, gentlemen, fail to indicate as to whom that was admitted or excluded.

Mr. Bender: As to defendants Alprin and Klein, your Honor. It was admitted as to those two, according to my notes, and not as to the others.

The Court: I meant to check it in my bench [6250-A] notes, but I never got around to it.

(After examining) Yes, that is quite right.

Have I heard any expression by anybody?

Mr. Kiendl: The same motion, your Honor.

[6251] The Court: Mr. Bender, the same motion?

Mr. Bender: The same motion, and on the further ground that it certainly cannot be background anymore after June 1, 1946, unless it has direct relation to the fifth count, and it should be excluded.

Mr. Donohue: I move to strike, your Honor, on the ground that it is incompetent, irrelevant and immaterial to any issues stated.

Mr. Bauman: I can conceive of relevancy, your Honor, and I would just like to submit this to the Court: Here is a set of minutes which provide for the election of officers and directors, and also the minutes substantiating the adoption of the resolution, a bank resolution, making Hyman Harvey Klein the authorized signatory of Ramsey Scott.

Now it is conceivable to me that the minutes of this meeting can properly be regarded as being an act in support of the fifth count, since the election of officers and the persons elected as officers might conceivably be regarded as an attempt at beclouding or covering up defendant Klein's participation in the financial operations of this company during the period charged in the fifth count, and for the purpose of impeding the Government in the collection of its revenues.

[6252] The Court: Well, would it be admissible, or rather would it have rational probative—would it be rationally probative as to defendant Haas and defendant Alprin in the absence of a finding that there was a conspiracy, as charged in the fifth count, and that they were participants therein?

Mr. Bauman: Well, in the absence of a finding of a conspiracy——

The Court: Yes.

Mr. Bauman: —involving them, would this be rationally probative as to them?

The Court: Yes.

Mr. Bauman: Obviously no, your Honor.

The Court: Then under those circumstances the most that can be said for it—now we are getting for the first time into an area of the situation presented by things that had their genesis after June 1, 1946.

Mr. Bauman: That is why I have answered your Honor on that question.

The Court: Exactly, and therefore for the time being, then, it would seem to me that it could be received on your theory——

Mr. Bauman: As to the defendant Klein.

[6253] The Court: Only as to Klein.

Mr. Bauman: That is correct.

The Court: The motions to strike by Alprin and while Haas made a motion to strike, it is not in as against him, but from the context on which we agreed those two motions would have to be granted.

Mr. Bauman: I think that is right, sir.

The Court: All right. So then as to Klein's BU, the motion by Klein to strike is denied.

The motion by Alprin to strike is granted, and the exhibit remains excluded as to Haas, and so that we may not have any difficulty about that in the future, does everyone fully understand the rationale upon which the Court addressed its question to Mr. Bauman and his answer?

Mr. Kiendl: I understand that, your Honor, but I do not understand your Honor's rationale in admitting that exhibit as against the defendant

Klein, in support of a conspiracy to impede the Government in the collection of taxes.

I do not see how it has any possible probative force in that connection.

The Court: Let me look at it again.

Mr. Kiendl: It is a valid corporation, [6254] the directors' meeting of Ramsey Scott authorizing them to open a bank account, showing that Rosenberg resigned and the death of de Cubas was announced.

How can that possibly have any probative value as to the participation of Klein in a conspiracy to impede the Government in the collection of income taxes due from three defendants or three individuals?

The Court: What about the provision there that Hyman Harvey Klein is the authorized signatory of the corporation?

Mr. Kiendl: It shows that he is authorized to sign for Ramsey Scott, but it isn't background material now, your Honor.

The Court: Oh, no, this is not background material.

Mr. Kiendl: This is to prove a conspiracy to impede the government in the collection of income taxes supposedly due from Roer, Alprin, Koerner. How can there possibly be any probative effect in that connection?

The Court: I think you are arguing as to the weight.

I am not disposed to change my ruling, Mr. Kiendl.

[6255] Mr. Kiendl: Well, your Honor asked if I understood the rationale. That is the only reason I replied.

The Court: That is quite all right. I am happy to have you give utterance to those expressions because it aids me in crystallizing these things, but I will adhere to the disposition as to Klein's BU, that is, it is excluded only as to Haas and Alprin.

* * *

[6256] *The Court*:

Klein's BX is next, at page 2035 of the minutes. That is an original certificate of incorporation of John Dunbar, in Spanish.

Now there is no purpose of our keeping a document in Spanish in evidence if we have coming up next, which I believe is the translation of that document, so Klein's BX is stricken.

We come now to the translation of that document, an English translation of the certificate of incorporation of John Dunbar & Co., Inc., and the bylaws of the said corporation received at page 2035 as to Klein and Alprin.

Mr. Kiendl: Defendant Klein moves to strike it out on the same grounds it moved to strike out the other certificates of incorporation.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The exhibit is principally, I believe, your Honor, in evidence as to the defendants Alprin and Klein.

[6257] The Court: That is right.

Mr. Bauman: The Government opposes these motions to strike and moves the admission of this exhibit against the defendant Haas, as to the defendant Haas.

The Court: The motions to strike are denied.

The Government's motion that it be admitted as to all three defendants is granted.

* * *

[6259] The Court: Motion is granted.

Next comes Klein's CD at page 2060, translation of the certificate of incorporation and bylaws of Coast Exporters, Inc. I suppose that is de la Costa.

Mr. Bauman: It is, your Honor.

The Court: That was received as to Klein and Alprin.

Mr. Kiendl: I move to strike on the general grounds.

Mr. Bender: I move to strike.

Mr. Donohue: The defendant Alprin moves [6260] to strike, your Honor.

The Court: Motions of Klein and Alprin to strike are denied and motion by Haas to strike is denied. It was not originally offered——

Mr. Bauman: The Government moves its reception as to Haas.

The Court: Motion is granted.

And now we come to Klein's CE, a certified copy of a resolution dated December 27, 1945, authorizing the opening of a bank account of Coast Export-

ers, Inc., Exportadores de la Costa, at the Chase National Bank, received originally as to Klein and Alprin.

Mr. Kiendl: The defendant Klein moves to strike.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

The Court: Denied.

Mr. Bauman: The Government moves the reception of the exhibit as to the defendant Haas.

The Court: Granted.

* * *

The Court: Without my saying so, let us [6261] understand one thing: that every one of these documents dated prior to June the 1st, 1946, unless there is specific discussion about it otherwise, is being received against all three defendants for the purpose, and solely for the purpose and limited to the purpose of, instructing the jury in the setup, the relationship of the parties, the transactions, what they were doing before June 1, 1946, so that they may intelligently have in their mind's eye a picture of the negotiations, what was occurring, and from that point, June 1, 1946, determine ultimately, if they get to that point, whether there was a conspiracy, who participated, et cetera, et cetera.

Now we all understand that that qualification applies to every document and will apply incidentally to every bit of oral testimony prior to June 1, 1946,

so I will save you gentlemen the necessity of getting up and inquiring.

* * *

[6263] Now next is Defendant Klein's CG, minutes of a directors meeting of Exportadora de la Costa held December 31, 1946, adopting a resolution to open an account in the Royal Bank of Canada, electing officers and directors, to which minutes were appended, resignations of Klein, Gurri and Rosenberg dated December 30, and December 31, 1946, respectively. That was received originally as to Klein and Alprin.

Mr. Kiendl: Defendant Klein moves to strike, no proof of any conspiracy.

The Court: That motion is denied.

Mr. Bender: Defendant Haas moves to strike on the ground that it is not background, on the second ground that it would not be binding as to him in any event.

Mr. Donohue: Defendant Alprin moves to strike on the ground that the document is irrelevant, incompetent and immaterial to any issue stated in the fifth count of the indictment.

The Court: Now, as I stated, defendant Klein's motion is denied. The document will remain excluded as to the defendant Haas, his motion to strike being granted, and will be excluded as to the [6264] defendant Alprin, his motion to strike being granted.

* * *

[6265] The Court:

* * *

So that, then, brings us to Klein's CL, at page 2125, and that is a translation by Dr. de Cubas of the certificate of incorporation and bylaws of Exportadora Kent, S. A., dated July 3rd, 1945, the officers of Kent Exporters being named in the certificate as Dr. Moran, Dr. Gurri, Dr. de Cubas, and Dr. Cabarrocas.

Now that was received as to Klein and Alprin.

Mr. Kiendl: Defendant Klein moves to strike on the same grounds that he moved to strike CD, certificate of Exportadora de la Costa.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

The Court: The motions are denied.

Mr. Bauman: The Government moves the reception of the document as to the defendant Haas.

The Court: Granted.

* * *

[6267] The Court:

* * *

That brings us to Klein's CP, minutes of a directors meeting of Exportadora Kent held December 31, 1946, at which a resolution was adopted to open an account with the Royal Bank of Canada, and officers were elected. Attached to these minutes and as part of the exhibit is a proxy of Alistair McLennan, dated December 4, 1946, and the resignation of Ellis Rosenberg as director and treas-

urer of the company December 31, 1946. Received originally as to Klein and Alprin.

Mr. Kiendl: Defendant Klein moves to strike.

Mr. Bender: Defendant Haas moves to strike on the ground that it is not background material, and on the further ground that it is not binding as to him in any event on any of the issues in the fifth count.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes the granting of that motion, sir.

The Court: The motion will be denied as to the defendant Klein.

* * *

[6268] The Court: And the motion of defendant Alprin to strike is granted and the exhibit will remain excluded as to the defendant Haas.

Defendant Klein's CA is the next at page 2139, and it is a duplicate original of a bank resolution of Exportadora Kent dated October 11, 1945, authorizing the opening of a bank account in the Royal Bank of Canada.

Mr. Kiendl: Defendant Klein moves to strike.

Mr. Bender: Defendant Haas moves to strike.

* * *

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

* * *

[6269] Mr. Bauman: The Government opposes and moves that it be received as to the defendant Haas.

The Court: The motions to strike are denied and the motion that it be received as to all three defendants is granted.

Next comes Klein's CR, page 2141, duplicate original of a resolution of Exportadora Kent dated December 28, 1945 authorizing the opening of a bank account in the Chase National Bank of New York. [6270] And I take it that the applications are similar to those on CQ and the ruling is the same. So Klein's CR will remain as to all three defendants.

* * *

Now we come to Klein's CU, which is a letter from John Dunbar & Company, Limited to Exportadora Kent acknowledging instructions that H. Harvey Company, Limited could communicate directly with John Dunbar & Company, Limited, re shipments of Dunbar whiskey. Now that letter was dated October 19, 1945.

Mr. Kiendl: Defendant Klein moves to strike, on the ground that it is not admissible even as background material.

Mr. Bender: Defendant Haas moves to strike.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

The Court: There, again, it is a counterpart in essence of Government's 12, if I correctly understand. It is similar except——

Mr. Kiendl: It is John Dunbar and H. Harvey Company.

The Court: Yes.

Mr. Bauman: I submit, sir, that this is proper background evidence in that it does relate to [6271] H. Harvey & Company and John Dunbar.

Mr. Bender: Your Honor, H. Harvey & Company doesn't have anything to do with the fifth count, even from the point of view of background information.

The Court: The fifth count charges that the conspiracy was to conceal or to impair and impede in ascertaining the income of the defendants. It doesn't say which defendants. And I would assume that would have to be limited to the defendants mentioned in the fifth count.

Now the defendants mentioned in the fifth count, those that are on trial here, are Klein, Haas and Alprin. However, it does state that the concealment was as to the nature and source of their income. I think that was the first numbered paragraph of the fifth count; it was part of the conspiracy. The bill of particulars identifies the nature and source of income as including the Dunbar transactions. But I want to see whether that was limited. I believe that was limited to the first four counts.

Mr. Kiendl: The first four counts only.

Mr. Bauman: I don't think it was one of the particulars required to be given in the fifth [6272] count, your Honor.

The Court: The motion to strike by defendant Klein is denied. The motion to strike by defendant Alprin is denied. And the motion by Haas is denied. But it was not received originally as to Haas.

Mr. Bauman: The Government moves that it be received as to the defendant Haas.

The Court: That motion is granted.

* * *

[6278] Mr. Kiendl: —Klein's Exhibit CY. We move to strike it out.

The Court: What does it resolve?

Mr. Bauman: It is substantially what Mr. Bender said.

May I hand it up to your Honor (handing).

The Court: (After examining) The motions of the defendants are denied.

Mr. Bauman: The government moves it be received as to the defendant Haas.

The Court: That is granted.

Klein's DA, minutes of a board of directors' meeting at Financiera Lloyds, held on February 2, 1946, authorizing the president Klein to dispose of the assets of the company.

[6279] Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

The Court: Denied.

Mr. Bauman: The Government moves that it be received as to the defendant Haas.

The Court: Granted.

* * *

[6282] Mr. Kiendl: We make the same motion with respect to DE-2 as we made to other certificates of incorporation.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

The Court: The motions as to DE-1 are granted.

(To Mr. Bauman) You are not pressing the Spanish one——

Mr. Bauman: No, no, I thought you were talking about DE-2.

The Court: As to DE-2 they are denied.

Mr. Bauman: The Government moves the admission of Exhibit DE-2 as to the defendant Haas.

The Court: Granted.

We come to Klein's DF on page 2191——

* * *

[6283] Minutes of meeting of the directors of Seaboard Syndicate held on January 21st, containing a resolution appointing Klein as the authorized signatory of the company to maintain bank accounts

et cetera in any bank throughout the world and a resolution opening a bank account in the Royal Bank of Canada and the Bank of Nova Scotia and the Bank of Montreal, and the Canadian Bank of Commerce. Directors then elected Jaime Cabarrocas to fill the vacancy on the board of directors occasioned by the resignation of Klein. This is a very long one. The resolution was then adopted authorizing the president to assign to Klein, if agreeable to him, 78,555 shares of the common capital stock of United Distillers of Canada, Ltd. then owned by this corporation, i.e. the Seaboard Syndicate, S. A., for a price of $8 per share. The meeting then elected officers of the corporation. Contained in the exhibit and annexed to the minutes of the meeting was a proxy signed by Klein, a resignation as a director of the company signed by Dr. Gurrie, a resignation as a director and assistant secretary signed by Ellis Rosenberg and a resignation as president, treasurer and director of the company signed by Hyman Harvey Klein. Klein's proxy was dated January 17, 1947, Gurrie's resignation [6284] was dated January 27, 1947, Rosenberg's resignation was dated January 21, 1947, and Klein's resignation was dated January 17, 1947. That is a repeat, apparently.

Now this is something that occurred subsequent to June the 1st of 1946, and I would be of the opinion it falls into the category in which is contained Klein's CP, i.e., that it would not be admissible as against Haas or Alprin, unless and until the jury were to find

that there was a conspiracy charged in the fifth count and that they were participants therein.

Mr. Bender: May we inquire in any event as to materiality the purchase in DF of 15,000 shares of Waldorf has to do with the fifth count?

The Court: 15,000? 15,000 shares of Waldorf?

Mr. Bender: No, the 78,000 shares of common.

The Court: The 78,000 shares of common? Oh, I don't know. On a motion to strike it it may very well be that the jury might consider that as one of the parts or one of the actions in furtherance of the conspiracy to conceal, to throw sand in the Government's eyes. I mean it is——

Mr. Bender: Does that mean that the Government [6285] takes the position that the 1947 tax return of H. H. Klein is involved in the fifth count?

The Court: I understand the fifth count to mean that the Government takes the position that anything commencing June the 1st, 1946, up to, and although the indictment says, which is not controlling in the face of the proof, up to the present time, it would seem to me that the terminus wou'd be the last utterance made by any of the alleged co-conspirators which would bring us down to the last statement made by either Klein, Koerner or Alprin to the Internal Revenue Service. That I would say is the limitation of the conspiracy, from June 1, 1946, to the last of those statements, excluding Roer's.

Mr Bauman: I don't remember which is later, the last statement or the filing of the Alprin 1952 return during the year 1953.

Mr. Donohue: I can say to you that the statement was prior to the filing of the return.

Mr. Bauman: That was my recollection.

Mr. Alprin: In October.

The Court: Well, the last Klein statement—the first one was on November 26, 1952, and then as I recall it there was a subsequent one in December of 1952, [6286] so that would be prior to the filing of the 1952 returns which was done in 1953.

The Haas statement was in November of 1952.

Roer's statement is not in, as I take it, because he is not named even as a co-conspirator.

And Koerner's statement, of course, was in 1948.

So it would appear then that the terminus date so far as the proof is concerned would be the last filing of a 1952 return by either Koerner or Alprin.

Mr. Bender: May I point out, your Honor, that if I recall correctly this exhibit was called to the attention of the jury by Mr. Kiendl for the express purpose of showing this exhibit and the others that the tax return of H. H. Klein in 1947 which referred to capital gains was accurately reflected, and in effect if this is left in to go to the jury what is going to happen is that the jury is being told the capital gains reported on that return which the Government charged was false as to the first four counts is in effect back into the picture again.

The Court: No, it isn't. I don't see that at all. I am sorry I can't see that at all.

Mr. Bender: Well, it is the only part of [6287] the return that was claimed to be false by the Government.

The Court: That may very well be, but I still say that these exhibits may have a dual purpose in this case, in one context as to the first four counts which are now out, but in another context with respect to the fifth count. And who am I to say that the jury might not in conjunction with other evidence come to the conclusion that the purchase of the 78,000 shares of UDL stock was part of the conspiracy to obscure these transactions?

Mr. Bender: You mean obscure the fact that he should have reported dividends on it?

The Court: No, no, no. The fifth count doesn't charge anything about reporting. The fifth count charges a conspiracy to conceal from the Government by various means and machinations, and they may run into a number of different things, just what the true picture was. To prevent the Government from determining by the ordinary processes of investigation and audit how much tax was owed by the defendants Klein, the three Canadians, Alprin and Haas. Now that is the way I construe the fifth count.

Mr. Kiendl: Is that the way your Honor [6288] construed it in your opinion on the motion for a judgment of acquittal? We understood very definitely that in your Honor's opinion as we read it you confined the fifth count only to the income of the three, Roer, Alprin and Koerner. That is specific and that

is the thing we went to trial on. Now we call your Honor's attention to the fact——

The Court: Oh, no, no. I remember my language in that opinion, and while I will confess that you might have been entitled to get that notion from it, I don't think that that is exclusive.

Mr. Kiendl: We thought it was, if your Honor please. But we do call your attention to the fact that the fourth count contains an allegation regarding the concealing of the nature and source of the income and we have been acquitted as to that.

The Court: Yes, in connection with the charge that you aided and abetted or procured the evasion and attempted evasion of income tax by Klein, but not on the charge that you did certain things to prevent the Government from ascertaining.

For example, let us go back to the simple example that I gave a long while ago, and that is this: I own a house in Budd Lake, New Jersey, and in 1944 I [6289] take as a deduction my real estate taxes on my house in Budd Lake, and for some reason, unaccountable reason, I get the notion in 1945 that I had no right to deduct those real estate taxes in 1944. So I say to my brother—and I am eliminating my wife from the picture because there might be some question of her right to testify, et cetera—I say to my brother, "You reviewed my figures on my 1944 return. Now I see I took off my real estate taxes in 1944 and I had no right to do it. If the Government comes prying around, if they come inquiring and if they ask you if I own any property in Budd Lake or anything of that kind, why, tell them No."

Now I have the right to deduct those real estate taxes in 1944. And I say that if my brother and I enter into that conspiracy, and of course there is an overt act and all of the other requirements of a completed conspiracy, the mere fact that I am not guilty of having committed any crime with respect—or not guilty of having attempted to evade my 1944 taxes by taking that deduction, that independently of that there may be the crime of conspiracy to obstruct the Government in ascertaining what the true picture was.

Mr. Kiendl: I appreciate that, your Honor, [6290] but under this indictment as I am attempting to point out the indictment in the fourth count says, "It was part of the conspiracy that the defendants would form and cause to be formed in Cuba a corporation known as Agencias for the purpose of concealing the source and nature of the income arising from the sale of Harwood's Blended Canadian Whiskey."

Now in the fifth count they charge:

> "That it was a part of the conspiracy that the defendants would conceal and continue to conceal the nature of their business activities and the source and nature of their income."

And then they go on to say that the conspiracy consisted of the filing by the three individuals of their income tax returns for the years 1950 and 1952.

The Court: Not solely that. It was a part of that conspiracy.

Mr. Kiendl: It was part of the conspiracy.

The Court: All right. Now, I say to you that even though almost identical language appears in a given paragraph of the fourth count and a given paragraph of the fifth count does not defeat my understanding that that given language addresses itself in the fourth count to an alleged conspiracy to attempt [6291] to evade Klein's 1944, 1945 and 1946 income taxes; whereas in the fifth count it addresses itself to an entirely different conspiracy, the conspiracy of preventing the United States Government from finding out what the true tax picture was. And while I may not be able to put it across to you I have a very clear understanding of a distinction between those two counts.

Mr. Kiendl: Well, we of course very radically differ with your Honor in that interpretation of the indictment.

The Court: Oh, I appreciate that, but that is my understanding. Now I don't know if I am stating the Government's position, but I am certainly stating what I understand the Government's position to be.

Mr. Bauman: That is precisely the Government's position. No question about it.

Mr. Bender: Your Honor, may I just point out one other thing to you, that as I read this fourth count it refers to a conspiracy by all the defendants and as part of the conspiracy it sets forth the H. H. Klein returns of '44 to '46 plus the three Canadians. But on the same theory on which you

permit the Government to be able to say that Haas' situation with la Ribera, even though it is not set out as a part of the conspiracy [6291a] under the fifth count, the same theory would apply under the fourth count as to the returns of the——

[6292] The Court: Mr. Bender, this may be a very poor parallel but it may indicate to you the course of my thinking. If I hold a gun up to you I commit two crimes: I commit the crime of assault and I commit the crime of violating the Sullivan law—assuming I had no permit even for the gun.

That is precisely what I am trying to get across as my understanding. Now if I am wrong, and if there is a conviction, the Circuit Court won't hesitate, as they have done on innumerable occasions before, to tell me I am wrong. Now I know it is no nourishment to the defendants—that is no nourishment to the defendants but I have to call my shot here the way I see it, and that is the way I see it. I called it the way I saw it as to the first four counts and I didn't care whether the Government liked it or not, and I am not unmindful of the fact that there are some judges who will not grant a motion for judgment of acquittal under any circumstances, and in my view abandon their judicial function when they say "Well, let us see what the jury will do with it."

I am not geared that way. I had no hesitancy in throwing out the first four counts and I [6293] thought they should be thrown out, but with the same conviction I feel that in my construction of the in-

dictment there is a basis, as I distinguish—there is a basis to distinguish the fifth count from the first four.

Mr. Donohue: If your Honor please, may I take this opportunity to suggest to your Honor the possibility that when we have completed an analysis of the documents and the evidence which may go to the jury, on the theory that it is background, properly before the jury with respect to the fifth count, that we be given the opportunity to present to your Honor a discussion of what perplexes me greatly, that here on the 48th day of the trial, which began as far back as the 4th of April, lawyers of—if I may be pardoned for including myself—skill and experience, and a skilled prosecutor and an able judge, are still debating about what the fifth count says, when certainly under all the constitutional guarantees to which these defendants are entitled they are entitled that a count go to a jury which lay minds can understand, and I would like an opportunity, when we finish the task immediately before us, to address myself to your Honor by [6294] paralleling every statement that has been made by all of us here, including Mr. Bauman, who has made at least half a dozen on his interpretation of the fifth count, paralleling your Honor's interpretation of the fifth count and give our own version.

The Court: Well, you certainly, Mr. Donohue, will be given the fullest opportunity without limitation to do so.

Mr. Donohue: Thank you, sir.

The Court: But while I think I have indicated there was a doubt in my mind up to the point where I had to come to a conclusion as to the fifth count on the motions to acquit with respect thereto, no doubt resides now.

Now of course that is not a question of pride of authorship or mental arrogance—don't misunderstand me. I have a firm conviction that there is a distinction between the two counts. I may be all wrong.

Mr. Donohue: Well, the very fact, if it please your Honor, that your Honor had doubt even up to the time when your Honor had to consider late in June——

[6295] The Court: Oh, yes.

Mr. Donohue: —motions for judgment of acquittal is, in my humble opinion, strong persuasive argument that the count must be fatally defective as submitted to a lay jury who hasn't the skill and the background and the experience of lawyers to decide it.

The Court: Well, I understand my functions are—it is to try——

Mr. Donohue: Yes.

The Court: —and tell the jury what is presented, and I will say very honestly and candidly to you, and let the Government know that I propose to tell the jury, if and when the times comes, that they will be able to convict under the fifth count soley and only on the basis that this alleged conspiracy was erected for that purpose and that purpose only.

I intend to go so far as to tell this jury, unless I am persuaded to the contrary between now and the time I charge, that even if this jury were to find that this conspiracy, assuming they found a conspiracy, was erected for the purpose of evading, that they cannot convict, they have to find one thing and one thing only, [6296] that it was erected for the purpose of preventing the Government from ascertaining the true tax liability. It will be that narrow.

Mr. Donohue: Well, I may say to your Honor just in concluding—in conclusion, among the three counsel for the defendants, the Court and the Government, I think there is still, as of this morning, a doubt as to whether or not the income tax returns of the defendant Klein are in issue in the fifth count of the indictment, which again bespeaks of the chaos that will result if this count is sent to a jury when we are supposed to be able to understand the charge in the indictment, and still don't know.

The Court: Well, I don't know—I may be sticking my neck out by undertaking to answer your question but I will——

Mr. Donohue: I am not asking for an answer. I am only asking your Honor to give us the opportunity when we have concluded the task immediately before us, to discuss it.

The Court: You may be assured not only on this score but any other score, if we have to sit here all summer, that these defendants will be given the opportunity to state anything they wish.

[6297] Mr. Donohue: And I would like to state that we have been given that opportunity and I am sure we will be given that in the future.

The Court: I hope so.

Now we come back, after this discussion, to Defendant Klein's DF, which we are reminded are the minutes of the meeting of the Seaboard Syndicate held on January 21, 1947.

There again we are put in the same position as we were with relation to Klein's CP—that if no conspiracy is found by the jury, then—I should not say that; I misspoke myself.

What I meant to say was that until a conspiracy will have been found by the jury, that this evidence would not be admissible as against those who on the face of it appear to have no connection with it, i.e., Alprin and Haas.

So under the circumstances—and I am assuming that an objection has been made or motions have been placed on the record already—

I think they were, were they not?

Mr. Kiendl: No, your Honor, and we are not moving to strike Kl-DF.

The Court: All right, what about Haas?

[6298] Mr. Bender: No, not in view of your Honor's statement, I won't either.

Mr. Donohue: Well, defendant Alprin moves to strike.

The Court: All right.

Now as to Defendant Klein's DF, the motion of defendant Alprin to strike is granted.

Mr. Bauman: I am not moving its admissibility as to the defendant Haas for what I am sure is the obvious reason to the Court, that I can conceive of a situation where the defendant Haas does not move to strike the exhibit but yet it would not, by failing to move to strike, make the exhibit admissible.

The Court: Yes.

Mr. Bender: Well, I don't know——

The Court: We will analyze that in a minute.

(Laughter.)

The Court: We have this situation:

The exhibit originally was excluded as to Haas and defendant Haas' objection was sustained—now Haas does not move to strike it. Therefore it remains excluded.

The Government does not, as it has heretofore, done in these situations, offer it as against Haas, [6299] therefore it still remains excluded.

Now if Haas wants it in, it would appear incumbent, in my view, that Haas now moves that it be received as to him.

I think I have traced the history of it as it exists.

Mr. Bender: I think as a practical matter, if it is in the record as far as Klein is concerned, any defendant can utilize it even though it may not be admitted as to him; am I correct in that statement?

The Court: I am not going to undertake to answer that question; that is for you to determine. All I can tell you is what happened is this, that as of this moment Klein's DF is in the record only as

to Klein, and despite the fact that you did not move to strike it is still excluded because the Government has not come forward with its usual request that it be received as to you.

Mr. Bender: The defendant Haas would not like to change his position at this time.

The Court: All right. Then we all understand each other, that Defendant Klein's DF is in the record only as to Klein.

Mr. Bauman: Right.

[6300] The Court: And that it is excluded as to Haas and Alprin.

Mr. Bauman: The request would not be usual in documents after June 1st, 1946. That is why I haven't moved.

* * *

[6307] The Court: Now we will take up with Roer's DJ. That was received at page 2209—just a moment, gentlemen, and I will give you my summary of it for what it is worth.

[6308] This is the minutes of a meeting of the Tivoli Trading Company, S.A., a Panamanian corporation, held in Cuba, on December 30, 1946, at which officers and directors were elected, and a resolution was adopted that the corporation open bank accounts in the Royal Bank of Canada, the Bank of Nova Scotia, and Banco Industrio S.A., an industrial bank in Havana, and appended to the minutes and part of the exhibit are the proxy of Albert Roer, dated December 20, 1946, the resignation of Albert

Roer as first assistant secretary and director of the company dated December 23, 1946, the resignation of William Rokoff as second vice-president and second assistant secretary, dated December 20, 1946, the resignation of H. H. Klein as agent of the company dated December 30, 1946, and the resignations of Ellis Rosenberg as president and treasurer of the company dated December 23, 1946.

Mr. Bauman: Now as to those——

The Court: It was, incidentally, received as to Alprin and Klein, and excluded as to Haas, if my——

Mr. Bender: That is correct.

Mr. Bauman: Yes, that is correct.

The Court: —summary is correct.

[6309] Mr. Kiendl: Mr. Bauman, do you recall the certificate of incorporation of Tivoli—the exhibit number?

Mr. Bauman: I don't recall.

The Court: Isn't that Government's Exhibit 89-A and B?

Mr. Kiendl: We move to strike this particular exhibit, 89-A and B.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin does not move to strike the exhibit.

Mr. Bauman: The Government opposes the motion to strike the exhibit.

The Court: Now let us see. This does contain the resolution regarding the opening of bank accounts.

Defendant Klein's motion to strike is denied.

Defendant Haas' motion to strike is denied, and Alprin addresses no motion with respect to this document.

Mr. Donohue: I am afraid my motion was in the negative. I do not move to strike it.

The Court: Yes.

Mr. Donohue: So there is no motion.

The Court: This was excluded originally as [6310] to Haas and Haas alone.

Mr. Bauman: Well, this, sir, is within the period of the conspiracy so, as I understand your Honor's ruling, I am not at liberty to offer it as to Haas.

The Court: Yes.

Mr. Bauman: This is within that category about which we have spoken, namely, from June 1st on your Honor will charge the jury at the appropriate time. It is for that reason that I am not moving, if I understand your Honor's position correctly.

The Court: You understand it correctly.

Roer's DG will remain as to all three defendants.

* * *

[6319] The Court: All right.

Now then the defendants' motions with respect to 87-A are denied and the Government's motion with respect thereto is granted.

The defendants' motion with respect to 87-B just as a matter of form are granted because it is a Spanish version and there is no purpose in encumbering the record with it.

88-A and B reecived at page 2336 of the record. 88-A is an English translation of 88-B, which is in Spanish, and is a certificate of incorporation of a Panamanian corporation named Regan Potter & Co., Ltd., S. A., registered April the 9th, 1945. It was received originally as to Klein and Alprin.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: A like motion, your Honor.

Mr. Bender: That is as to A and B?

The Court: Granted as to B, which is the Spanish, and denied as to A.

Now this, as I indicated, was excluded as to Haas.

Mr. Bauman: The Government moves that it be admitted as to Haas.

[6320] The Court: That motion is granted.

Now 89-A and B, and there we have at page 2338 of the record a document that was excluded only as to Haas, and that 89-A being the English translation of 89-B, which is in Spanish, and is a certificate of a Panamanian corporation named Tivoli Trading Company, S. A. registered April 9, 1945.

I take it the motions are the same.

Mr. Kiendl: We have no motion.

Mr. Bender: We have no motion.

Mr. Donohue: No motion.

The Court: All right.

Mr. Bauman: The Government moves its admission as to the defendant Haas.

[6321] The Court: The Government's motion that 89-A be received as to the defendant Haas——

Mr. Bender: I think I ought to indicate, your Honor, that I move to strike this exhibit. I had not had a chance——

The Court: Oh, I am sorry, I misunderstood you. I thought you did just the opposite.

Mr. Bender: No, I did not have a chance to say——

The Court: All right, you are moving to strike.

Mr. Bender: Yes.

The Court: Well, that motion is denied, and the Government's motion that this exhibit be received as to all three defendants is granted.

Mr. Bender: That is as to A, your Honor.

The Court: Yes.

Do the parties consent that 89-B be stricken? That is the Spanish version.

Mr. Donohue: Yes.

Mr. Bender: Yes.

Mr. Bauman: The Government does agree to that.

Mr. Kiendl: I consent that it cover all the Spanish versions.

[6322] Mr. Bender: We join in that.

Mr. Donohue: Yes.

The Court: All right, that is fine.

(Mr. Donohue confers with Mr. Bauman, off the record.)

Mr. Bauman: Mr. Donohue points out that I haven't expressed consent in the case of all Spanish

articles of incorporation, and I do so for the record.

The Court: All right.

Now Government's Exhibit 90-A and B received at page 2339—90-A is the English translation and 90-B, which is in Spanish, which is a certificate of incorporation of a Panamanian corporation named Waldorf Company, Limited, S. A., registered December 19, 1945, originally received as to defendants Klein and Alprin—incidentally, for example, this exhibit was also received as to Koerner.

Mr. Bender: Yes.

The Court: I am not stating it because there is no purpose in doing that.

Mr. Kiendl: I move to strike on the general ground.

Mr. Bender: Same motion.

[6323] Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes and moves the introduction of this exhibit as to the defendant Haas.

The Court: The defendants' motions are denied.

The Government's motion is granted and on the stipulation, 90-B is stricken, which is the Spanish version.

The ruling with respect to that exhibit being—the ruling denying the motion to strike and granting Government's motion, being confined to 90-A—

Now 91-A is the English translation and 91 which is the Spanish, the certificate of incorporation

of a Panamanian corporation named Seaboard Syndicate, S. A., registered December 19, 1945.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes and moves the receipt of this exhibit as to the defendant Haas.

The Court: The same disposition—90-B [6324] is stricken under the stipulation.

Motions to strike 91-A is denied and the motion of the Government with respect thereto is granted.

92-A and B, on page 2341 is an English translation of 92-A—92-A is an English translation of 92-B, which is in Spanish, and this is a certificate of incorporation of the Panamanian corporation named Cameron Stuart Co., Limited, S. A., December 8, 1945.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government takes the same position as it did with respect to 91.

The Court: The same ruling.

92-B is stricken pursuant to the stipulation.

Now Exhibit 93-A and B on page 2342 of the minutes—93-A is an English translation of 93-B which is in Spanish and is a certificate of incorpora-

tion of a Panamanian corporation named Douglas Ryan Syndicate, S. A., registered January 20, 1945.

Mr. Kiendl. The same motion.

Mr. Bender: The same motion.

[6325] Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government takes the same position as it did with respect to Exhibit 92-A.

The Court: The same ruling—93-B is stricken under the stipulation.

* * *

[6325] The Court: That is right.

Now what with respect to Klein's DK?

Mr. Kiendl: We move to strike.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to [6326] strike.

The Court: All right.

The defendants' motions with respect to Klein's DK are denied.

Now this was a document excluded as to Haas.

Mr. Bauman: The Government moves that it be received as to him.

The Court: That motion is granted.

Now, gentlemen, is there any purpose in retaining 87-A in the record, in view of the fact that now we have the certificate of incorporation?

Mr. Bauman: I see none.

Mr. Kiendl: We consent that it be stricken.

The Court: 87-A, then, will also be stricken out.

* * *

[6341] [Mr. Bauman:]

Your Honor, with relation to this and subsequent exhibits, those that are about to come, it seems to me that we are getting into an area now of relations between a person who is a defendant in this count and one who is named in the fifth count as a co-conspirator, and I would suggest——

The Court: Well, what type of relations? What do you mean? You mean the mere fact or are you trying to bring in the fact that Klein gave Koerner instructions as to who the salesman would be, what allocations there would be, what wholesalers would get [6342] it? Things of that nature?

Mr. Bauman: I think that is correct.

The Court: I don't think that belongs in the fifth count even—you are invited to try and persuade me. I don't want to appear to be the fellow who goes to a theatre and says, "Make me laugh," you know. But what I am saying is in complete candor that there is some limit to what can go in by virtue of this background material.

Mr. Bauman: Of course there is, Judge, and I hope I have indicated that in a great many——

The Court: Yes, but I don't think the mere fact that there was a close contact between these people for the purpose of exploiting Harwood to the mutual benefit of R. C. Williams and everybody else

involved that that is properly in the background material. What does it supply the jury? What does it give to the jury by way of better understanding that they can better approach the conspiracy, the charge of conspiracy in the fifth count?

Mr. Bauman: My answer is that it gives them a history of the relationship between Koerner and Klein which led up to Koerner's participation in the fifth count which led up to the drawing of this draft of [6342a] $264,000 which was held by Alprin for Koerner. It traces the real background and I submit the legally acceptable background, your Honor, between Klein and Koerner, both of whom which I urge upon your Honor resulted in the participation by both of those people in the fifth count, and the acts charged in the fifth count.

[6343] The Court: Well, sir, while what you say may address itself with some cogency to some other exhibit I dare say that it does not with respect to the exhibit under consideration which is merely a letter saying "Attached find copy of instructions we send to customers who purchased Harwood whiskey."

Mr. Bauman: I can see that. I can see the reasonableness of what your Honor says.

The Court: Well, I am addressing myself only to Government's 109 and on that basis I am going to grant the motion to strike. I don't want to be understood to have said that nothing may fall in the category you say, but as to this I have no doubt about it.

Mr. Bauman: Yes, sir.

The Court: 109, the motions are granted and 109 is stricken.

* * *

[6345] The Court:

117-A at page 2677 of the minutes is a letter from Koerner to Mortimer J. Glueck.

Mr. Bauman: May I suggest, sir, that the consideration of 117-A, 117-B be likewise considered because I think——

The Court: Well, the three of them have to be considered together. There are three together.

A letter from Koerner to Mortimer J. Glueck is A, Honolulu, Hawaii, dated April 6, 1946 indicating that when Glueck got his license they would make Harwoods available to him.

B is a form from which A was typed. And C is a letter from Alprin to Koerner, dated April 5th sending Koerner the form B.

Mr. Kiendl: We move to strike them all out, as not admissible on anything.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin moves to [6346] strike, your Honor.

Mr. Bauman: Now as to these, your Honor, the Government does oppose and does press its argument previously made. This is exactly the kind of background which I think is admissible with relation to the fifth count.

117-B prepared by Morris Alprin——

The Court: Yes, I agree with you.

The motions to strike are denied.

Mr. Bauman: As to those exhibits——

The Court: Now that originally was excluded as to Klein and Haas at page 2677.

Mr. Bauman: I now move its admission as to those two defendants.

The Court: Motion is granted.

Mr. Bender: This is as to background information?

The Court: Yes.

Government's 118-A is a letter from Koerner to Agencias Destiladores evincing interest in Harwood gin to be distributed by Williams' customers distributing Harwoods whiskey, dated August 2nd, 1945, and was received at page 2679.

Mr. Kiendl: The same motion.

Mr. Bauman: Well, as to that, sir, may I [6347] point out that I believe 118-B, which was received a considerable time later at page 4382 on June the 2nd, 1955, I request that that be considered together with 118-A in the determination of these motions.

The Court: What page did you say, sir? 4382?

Mr. Bauman: I have 118-B at 4382, your Honor, received into evidence.

The Court: Yes, that's true, 118-B being a form of letter unsigned but intended to emanate from R. C. Williams & Co. and on its letterhead, dated August 2, 1945, addressed to Agencias re Harwoods Gin and asking for terms upon which the same might be purchased, to be sold to customers handling Harwoods whiskey.

Mr. Bauman: That, sir, the Government submits is in the identical category as 117.

The Court: Well, sir, I have only heard an expression so far with respect to 118-A, and I think we will abandon the normal course of taking them in order because 118-B is so proximate to that in context, that is at page 2382 of the minutes.

What is the position of the defendants with [6348] respect to 118-B? The same as 118-A?

Mr. Kiendl: The defendant Klein moves to strike it out on the ground it is not proper background on anything.

Mr. Bender: Also, your Honor, this is no longer background. This was originally offered to show control of Koerner in the R. C. Williams' set-up. It goes right to the conspiracy charged in the fourth count.

Mr. Donohue: The defendant Alprin moves to strike.

The Court: Well, what you say is true, nevertheless I still feel it has its place as background as to to the conspiracy as I understand it being charged in the fifth count. Therefore the defendants' motions with respect to 118-A and 118-B are denied.

We will take a recess, gentlemen.

(Short recess.)

[6349] Mr. Bauman: Now, your Honor, with relation to Government's Exhibit 118-A, the Government moves its admission as to the defendants Alprin and Haas.

The Court: Granted.

Mr. Bauman: With relation to 118-B, sir, the Government moves its admission with relation to the defendants Klein and Haas.

The Court: Granted.

Now we come to Government's 119-A, which is a letter from Koerner, dated August 2nd, 1945, to Agencias Destiladores, setting forth the proposed basis for selling Harwood whiskey to monopoly states.

Mr. Bauman: In that connection may I respectfully refer your Honor's attention to 119-B, which was admitted at page 4383 of the record on June 2nd, 1945.

Mr. Kiendl: The defendant Klein makes the same motion as to 119-A and B that he did with respect 118.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

The Court: The motions are denied.

Mr. Bauman: The Government moves that 119-A [6350] be received as to the defendants Alprin and Haas.

The Court: Granted.

Mr. Bauman: The Government moves that 118-B be received as to the defendants Klein and Haas.

The Court: Granted.

I might indicate, Mr. Bauman, that I think you are just about on the periphery of what would constitute background material in these. I think you

are just about as close to falling off the brink as you can get without actually falling.

* * *

[6360] The Court:

129, a telegram from from Klein to Koerner, dated May 15th, requesting Koerner to apply to the Alcohol Tax Unit for a permit to use glass for Harwood referred to in a letter from Alprin to Klein, a copy of which was sent by Alprin to Koerner. That was originally received as to Klein and Koerner and excluded as to Haas and Alprin.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes——

The Court: They are, I recognize, more of a [6361] general nature, dealing with the conduct of the entire transaction, and on that basis I am going to admit it and deny the motions and Government's 129 will remain. It was originally excluded as to Haas and Alprin.

Mr. Bauman: The Government moves its admission as to those defendants.

The Court: That motion is granted.

* * *

[6369] Now, then, getting back again to Government's 147, Mr. Kiendl.

Mr. Kiendl: Defendant Klein moves to exclude it, your Honor.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

Mr. Bauman: Your Honor, may I suggest that with relation to this exhibit, this exhibit is of background nature.

The Court: I agree with you.

The motions to strike are denied.

Now we come to Government's 148.

Mr. Bauman: May I interrupt, your Honor?

The Court: Oh, I beg your pardon, yes. This was excluded as to Haas and Alprin originally.

Mr. Bauman: May I move that it be received as against those two defendants?

[6370] The Court: Motion is granted.

Government's 148 is at page 2735 and it is a telegram from Agencias Destiladores to R. C. Williams approving wholesale firms in the United States allotment totaling 20,000 cases of Harwood whiskey and appointment of Roer and Cohen approved.

It is obviously a reply to 147.

Mr. Kiendl: We move to strike, your Honor, on the same ground.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin moves to strike.

Mr. Bauman: The Government opposes, sir.

The Court: The motions are denied.

Mr. Bauman: The Government moves its admissibility as to the defendants Alprin and Haas.

The Court: Granted.

* * *

[6373] New York, July 1, 1955,
10 o'clock a.m.

Trial resumed.

(The following proceedings took place in the absence of the jury):

The Court: Now I believe we begin with Government's 153, at page 2739 of the minutes, which was excluded as to Haas and Alprin when originally offered. It is a letter on the letterhead of Agencias signed by Dr. Gurrier, addressed to Koerner at Williams acknowledging request by letter from Williams for approval of Wolfe as representative of R. C. Williams for the sale of Harwood's in California and Cohen as representative for Williams for the sale of Harwood's in Louisiana, Connecticut, and South Carolina, and approving the appointment of Cohen and approving the appointment of Wolfe only to a portion of the State of California.

Mr. Kiendl: Defendant Klein moves to strike.

Mr. Bender: The same motion, your Honor.

[6374] Mr. Donohue: The defendant Alprin moves to strike, your Honor.

Mr. Bauman: Your Honor, the Government asks that this motion be denied with relation to 153. It is one of the letters that bears the small initial "r" in the lower lefthand corner, and as such I think is one specimen of a certain type of letter that ought to be retained.

The Court: The motions to strike are overruled.

Mr. Bauman: The Government moves the admissibility of this exhibit as to the defendants Haas and Alprin.

The Court: Granted. This one letter of course will cover the category of prior relationship of the parties to show that letters might have been typed in Baltimore by Rokoff and signed elsewhere by other people. In other words I am not going to have an accumulation of these. I recognize the distinction that prompted me to overrule the motions to strike, but what I mean is that this is enough for that purpose. I don't want a series of them.

* * *

[6401] The Court:

210-A, B and C.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government objects.

The Court: This was originally excluded as to Klein, Haas and Alprin when received at page 3160 of the minutes. A is a letter signed Dave Sherman of F. Straus & Son, Little Rock, Arkansas, dated

August 21, 1945, addressed to Koerner and R. C. Williams & Co., Inc., inquiring about the prospect of a price reduction in Harwood's, enclosing B—a copy of a letter to Sherman from one Simon Shlenker, Jr., of New Orleans, concerning the same subject, i.e., price reduction of Harwood's; C—a copy of a letter typed for Koerner's signature dated August 27, 1945 addressed to Dave Sherman, acknowledging Sherman's [6402] letter of the 21st and advising Koerner was holding it for consultation with Klein at the Waldorf Astoria this week.

Motions to strike are denied.

* * *

[6409] The Court: Then Government's 249 will be taken up later.

That then brings us to Government's 250.

Mr. Kiendl: We have no motion to strike that.

Mr. Bender: Defendant Haas moves to strike.

Mr. Donohue: The defendant Alprin does not move to strike 250, your Honor.

[6410] Mr. Bauman: The Government opposes striking.

The Court: This was prior in date——

Mr. Bender: Yes.

The Court: —to the June date.

The motion by the defendant Haas is denied and Government's 250 will be received as to—now just a moment.

Mr. Bauman: I am going to move its receipt as to all three defendants.

The Court: Yes. That motion is granted and 250 will be received as to all defendants.

We will take a ten minute recess, gentlemen.

(Short recess.)

[6411] Mr. Bender: Your Honor, might I be heard on 250 before we get on to something else?

The Court: Yes.

Mr. Bender: 250 was originally admitted as to Koerner. Now while it is true that the check is dated October 2nd, 1945 and it antedates the date of the conspiracy so that it would come within your Honor's thought as to background material, actually the check itself does relate pretty definitely to one of the issues that the Government raises in the fifth count.

Now in that posture it is not background material anymore—at least as far as the defendant Haas is concerned, and I can't see how it would be admissible as to the defendant Haas until at such time, if at all, the jury found a conspiracy and in accordance with your Honor's charge was permitted to consider it as against the defendant Haas. And for that reason I urge that your Honor treat this as you would any exhibit which comes in after the alleged conspiracy date where it is not binding as to the defendant Haas on its face.

The Court: I adhere to my original ruling.

251.

Mr. Kiendl: We have no motion to strike.

[6412] Mr. Bender: I move to strike, your Honor.

Mr. Donohue: The defendant Alprin urges that it remain in the record, your Honor.

The Court: Haas' motion to strike is denied. It was originally excluded as to Klein, Haas and Alprin.

Mr. Bauman: Now I have made no motion to introduce this as to Haas because my recollection is that—I withdraw that.

What I had in mind, sir, was I thought that the testimony indicated this was executed after the date of the conspiracy and that is not my present recollection and I accordingly move its admission as to the defendant Haas.

The Court: Granted.

252 for identification was not received. That brings us to 253.

Mr. Kiendl: The defendant Klein moves to strike. That was the one that your Honor received I think against the defendant Klein alone on the ground of necessity.

The Court: And under the fifth count.

Mr. Kiendl: Yes.

Mr. Bauman: The Government——

The Court: I am waiting for the other [6413] defendants.

Mr. Donohue: Will your Honor indulge me for just a moment?

The Court: Surely.

Mr. Donohue: The defendant Alprin urges that 252 remain in the record—I am sorry, 253, if your Honor pleases.

Mr. Bender: Will you bear with me one second, your Honor?

(After pause) Defendant Haas moves to strike the Koerner tax return, that is, 253.

Mr. Bauman: The Government opposes the application to strike.

The Court: The application of Klein and Haas to strike is denied.

254.

Mr. Kiendl: The defendant Klein moves to strike.

Mr. Bender: The defendant Haas moves to strike.

Mr. Donohue: Would your Honor indulge me for just a moment?

(After pause) The defendant Alprin moves to strike on the ground that the exhibits are irrelevant, immaterial and not pertinent to any issue framed in the [6414] fifth count of the indictment.

Mr. Bauman: Your Honor, the Government opposes that motion and urges upon the Court that this is precisely what I think the cases have in mind when they talk about background testimony.

Mr. Donohue: I take it, if it pleases your Honor, that they were admitted for the purpose of showing that at a time when it had been determined by these defendants that a method of doing business through the use of foreign corporations entitled them to be-

lieve that no tax was due and owing to the United States from them as individuals, that these letters represent only the careful analysis of the problem by a lawyer, and so advising his client. They could have nothing to do with the fifth count but could only be introduced by the Government with respect to the fifth count for the purpose of prejudicing the defendant concerning an alleged scheme to evade taxes which your Honor has held to be a legal device to avoid taxes. We object to it.

The Court: The motions to strike are denied.

* * *

[6417] The Court:

Mr. Kiendl: We don't move to strike any one of those five consular invoices.

[6418] The Court: Well, of course you understand that the summary is part of that exhibit. 261 is the summary and then 261-A through F is a sample invoice—consular invoice for each category on the summary 261. The summary itself was received at page 3347. The consular invoices were supplied at page 5121.

Mr. Kiendl: As background material we have no objection to the summary.

The Court: All right.

Mr. Bender?

Mr. Bender: The defendant Haas will move to strike.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

The Court: Motions denied. And that will be Government's 261 and 261-A through F.

* * *

The Court: All right.

That brings us then to 262. And that is similar to 261 except addressing itself to the Auld [0419] Malcolm shipments, 261 of course being confined to the Harwood shipments.

Consular invoices of course are not supplied with respect to 262.

Mr. Bender: It is a chart, isn't it?

Mr. Bauman: Of Auld Malcolm.

The Court: Yes, it is a summary.

Mr. Kiendl: And 263?

The Court: And 263 is the summary on Dunbar.

Mr. Kiendl: And outside of our general objection as to background material we have no objection to this.

Mr. Bender: Move to strike.

Mr. Donohue: The defendant Alprin moves to strike.

The Court: Denied.

Here again the Government's 262 was not excluded as to any defendant if my notes are correct.

Mr. Bender: They are.

The Court: And that brings us to 263 which is a similar summary regarding the shipments of Dunbar.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion to strike.

Mr. Donohue: The defendant Alprin moves to

[6420] strike.

The Court: The same ruling.

Motions to strike are denied.

* * *

[6423] The Court: 272.

* * *

Mr. Kiendl: We do move to strike it.

Mr. Bender: We move to strike.

Mr. Donohue: The defendant Alprin moves to strike.

Mr. Bauman: The Government opposes that [6424] motion.

The Court: Denied.

* * *

[6425] The Court: Yes, that is why I would prefer if your motion addressed itself only to 274 and we take each one separately. It may take a little longer but we will understand better what we are doing.

Mr. Kiendl: We certainly accept your Honor's suggestion.

The Court: All right, then I will take it a motion to strike 274 has been made by you.

Mr. Bender?

Mr. Bender: The same motion, your Honor.

Mr. Donohue: May I inquire, your Honor, the bank records of what corporation?

The Court: Well, 274 was a file of records kept by the Royal Bank of Canada, New York City branch [6426] pertaining to Agencias Destiladores, S. A., including certified resolutions, correspondence, bank statements, deposit slips, checks and drafts.

* * *

Mr. Bauman: The Government opposes the striking of Government's 274, sir, and I suppose you would like to hear the reason?

The Court: I certainly would because I fail, unless you will expose it to me—I fail to recognize where this falls with even the remotest periphery of background material. These are the operations of corporations that I am satisfied that no reasonable person could say were not legitimate corporations functioning in usual corporate manner. Now what [6427] has that got to do with background material?

Mr. Bauman: It is the origin, Judge, of the—it is the genesis in effect of the Count 5 conspiracy. It is the origin of the money with relation to which the Government was impeded in its governmental operations. It is the beginning of a system calculated to impede the Government. And while your Honor's decision that these are legitimate corporations for tax purposes stands and is the law of the case it does not follow from that decision, your Honor, that legitimate though they may have been for tax purposes in the computation of income, and legitimate though they may have been with relation to whether or not they should be disregarded as tax shams, it is conceivable, sir, that they may have been part of a scheme to throw sand in the Government's eyes, even though in fact, to use the example which we have in this case, the Bowman Garage Company is a legitimate corporation, it is conceivable that such a legitimate corporation can in addition to its legiti-

mate purposes be used for the illegitimate purposes mentioned in the fifth count.

The Court: Well, if you were addressing [6428] your argument to the memorandum records that Rokoff kept for these various corporations I am not—I am not saying I would agree with you, but I am saying I might agree with you. We will come to that bridge when we cross it. But I can't for the life of me see where the bank transactions per se fall in that category. All they show is that money was deposited and withdrawn.

Mr. Bauman: Would your Honor bear with me just one minute?

The Court: Surely.

Mr. Bauman (To the reporter): Will you read the Court's last statement?

(Record read.)

Mr. Bauman: That's correct, but taken cumulatively, and at this point I ask your Honor to address myself generally to the subject of bank records in connection with this argument—taken cumulatively they may indeed show the use of legitimate corporations now so held for the purposes set forth in the fifth count. In other words, if I don't make myself clear, in 1945 Agencias may have gotten some money, and it may in 1945 have transferred to Exportadora Kent—and I am not attempting to use the identical [6429] corporations—and again to Financiera Lloyds and again to John Dunbar, until you get into the area charged in the indictment.

which area, sir, is not completely comprehensible without the background of the financial transactions of these corporations which preceded the period in the indictment. In other words, it lends sense and meaning to what—at least the Government so contends—to what the defendants did within the term of the crime charged in the indictment.

And from that point of view I respectfully suggest it is completely admissible background as to the charge in that count.

The Court: Motions are granted as to 274.

* * *

[6430] The Court: 276.

Mr. Kiendl: The same motion.

[6431] Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: Now as to this, these are series of checks, as your Honor may remember, of the Chase Bank, and they are drawn variously to Agencias Destiladores and Ramsey Scott. There are a number of checks starting at June 3rd, 1946, payable to Ramsey Scott. I would say offhand in just roughly estimating perhaps 20 such checks in that period.

The Court: Well, I would be disposed to admit those checks but not the entire file.

Mr. Kiendl: If your Honor please, what do the checks have to do with the allegations in the fifth

count concerning the individual income of the defendants?

The Court: I don't know.

Mr. Kiendl: This is corporate income.

The Court: I don't know but the Government argues—I mean I am not the trier of the facts, Mr. Kiendl.

Mr. Kiendl: I know that your Honor isn't, but if there is something so far removed with any [6432] possibility of a jury considering it in connection with the allegations of the count why should it be admitted? How can the jury possibly conclude that corporate manipulation of corporate income has anything to do with the individual income that is concerned in the fifth count?

The Court: Well, for example, might not a jury conclude from the fact that a million and a half dollars was involved and no entries made in the corporate books although these records would show the actual drawing of these funds vis-a-vis Tivoli and Regan Potter—might the jury not conclude on that that that was was one of the devices of obscuring to the Government the actual income that was taxable?

Mr. Kiendl: If your Honor pleases, the Government does not allege that the corporate income was obscured. It is the defendants' income that was obscured. There is no allegation regarding corporate income. There is no charge regarding corporate income. This is confined exclusively to the income of the defendants, and your Honor has

ruled that this was not income of the defendants.

The Court: Yes, I think you are right. [6433] Your motions to strike 276 is granted.

* * *

277.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion—oh, withdraw that a minute, your Honor.

(After pause) The same motion to strike with the exception of two checks made payable to Haas, Schlesinger & Mayers, one dated March 2nd, 1945 in the sum of $500, one dated January 11, 1946 in the sum of $500.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

Mr. Bauman: Now there are a number of checks in that category of checks paid to Haas, Schlesinger and Mayers. There are two of them, two checks paid to Koerner in 1945, and there are four checks paid to——

The Court: To Roer.

Mr. Bauman: Paid to Roer, one in 1944 and three in 1945.

The Court: And one to Alprin, $481.37. Isn't that so?

Mr. Bauman: I didn't notice that, sir.

Mr. Bender: Your Honor, may I change my [6434] position at this time, and with regard to this exhibit take the same position that Mr. Kiendl took and move to strike it as improper background material and not relevant to any of the issues of the fifth count?

Mr. Bauman: The Government opposes and calls to the Court's attention that in addition to the checks referred to there are a number of checks made payable to the co-conspirator William Rokoff.

Mr. Donohue: He is not a co-conspirator—I am sorry, I beg your Honor's pardon. I withdraw that.

The Court: No, that 481.37 was also a Roer check but my notes would indicate that there was a check in there for Alprin. Now I may be mistaken.

Mr. Donohue: That is Agencias I can say to your Honor. That could not be.

Mr. Bender: No.

Your Honor, might I point out the reason why I did that? Simply because there is a check made payable to Haas, Schlesinger & Mayers in these amounts by Agencias has absolutely nothing whatsoever to do——

The Court: It is still corporate functions [6435] as distinguished from the defendants' individual income.

Mr. Bender: Exactly.

Mr. Bauman: May I address myself to that problem of corporate functions?

I think your Honor may have come to that conclusion in the case of Agencias which is not within the period of the conspiracy charged, but I respectfully suggest that even though the indictment charges in the fifth count a course of conduct designed to conceal the nature and source of the defendants' income, that the nature and source of

the income of such defendants is susceptible of including these corporations which eventually indeed were responsible for the income reported by the defendant Klein in 1947 and was indeed, sir, the source of his income.

The Court: Well, if that is so you got it in the 1947 return.

Mr. Kiendl: Accurately.

Mr. Bauman: Fine. If you have the 1947 return, your Honor, you have the ultimate payee of this money—the ultimate corporate payee of this money to Klein. But, sir, this is not to say that the operations of these corporations were not within the scheme contemplated by the fifth count in [6436] obscuring from the Government the ultimate income which was indeed paid by one of them to Klein.

The Court: Well, then, you are beginning to persuade me that maybe I was wrong in assessing the fifth count vis-a-vis the first, second, third and fourth. I thought I understood this but you are bringing me right back to the confusion that apparently has assailed defendants' counsel since the commencement of this trial. You can't charge the same crime in two counts in the same indictment.

Mr. Bauman: I am not, Judge, and I am not trying to.

The Court: Well, you are doing an awfully good job of confusing me all over again when I thought I had this thing clear in my own mind. No, I am going to adhere to my ruling. I see no place in background or any other place as to these corporate

transactions, particularly in view of the fact that there is disclosed elsewhere in this trial,i.e., in Klein's 1947 return, his income. Now I think that is enough. I think that is all you are entitled to.

No, I will sustain the motions to strike and Government's 277 will be stricken.

* * *

[6438] The Court: Granted. 286.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: Would your Honor hold that for just a moment, please?

The Court: That was Cameron Stuart.

Mr. Bauman: That is correct. That corporation, your Honor, is one of a number in the category that was used to move these funds out of the United States at or about the time of the Government's investigation, and from that point of view the Government opposes the motion to strike 286.

[6439] The Court: Well, assuming that you are entitled to bring out the fact that withdrawals were made from Cameron Stuart's New York account and transferred to the Canadian account, on what basis would that entitle you to have the entire file in? Let us isolate it first to the things that——

Mr. Bauman: I don't want the entire file in. All I want is that portion of the file that would demonstrate that.

Mr. Kiendl: That is a transfer of corporate income, your Honor.

The Court: Well, there, even though it is corporate income, if that would show an intent to transfer the funds that ultimately came to him I would be disposed to allow that.

Mr. Kiendl: Intent by the corporation, if your Honor please, to transfer its own funds to another jurisdiction where it is incorporated in a foreign country? It seems to me that that just leaves the jury wide open to wide speculation and conjecture and it hasn't any probative value so far as the individual income of Klein is concerned, or the two other defendants who are now on trial.

The Court: No, I won't go along with you on [6440] that. To the extent that these corporate funds were transferred of the country I think the jury is entitled to know about it.

Mr. Bauman: May I limit——

The Court: Now then you will have to limit it to the specific items in the file that you want.

Mr. Bender: Your Honor, may I be heard a moment on that last statement that your Honor made?

The Court: Surely.

Mr. Bender: If the 1947 return, in the particular that the Government charged was false, has by your Honor's ruling been determined to be not false but correct in so far as the corporations were not sham and therefore the liquidation of Mr. Klein's interest is properly recorded as capital gain

on the 1947 return, then the mere fact that the corporations may have transferred funds out of the United States could not in any way have affected the proper assessment or determination of the tax due from Hyman Harvey K. in from the operations of these corporations. Therefore, to allow that evidence in is highly prejudicial and it gives the wrong impression to the jury.

The Court: I don't agree with you.

Mr. Bauman: I would like to limit my offer, [6441] sir, to a series of checks starting September 6, 1946, consisting of one—I have to limit it a little more closely so that I won't encumber the record.

The Court: Tell me how many checks in the beginning and closing date.

Mr. Bauman: There are three checks dated September 6, 1946, your Honor, Nos. 104, '5 and '6, each made payable to the Royal Bank of Canada. Do you want the amounts of those?

The Court: No. They are sufficiently identified I assume.

Mr. Bauman: There is one check dated September 12th which is made payable to Tivoli Trading Company, that is check No. 110, and the Government opposes the striking of that check.

Mr. Donohue: If it please your Honor in adopting, if I may, the argument of Mr. Kiendl and Mr. Bender in objecting to the introduction or in your Honor's failing to sustain our motions to strike, may I respectfully say to your Honor that the

attempt on the part of the Government to introduce the evidence of the flight of corporate capital now as respects the fifth count is a clear indication that the Government is treating your Honor's action in granting a motion for a judgment of acquittal as though your Honor granted [6442] that motion only with respect to the two defendants who are not here now, and disregarding the fact that the import of that motion for a judgment of acquittal granted by your Honor also pertained to the three defendants who are on trial on the fifth count.

The Court: I don't agree with you, and I will tell you why. In the first place, these checks which the Government urges be excepted from the granting of your motion to strike the entire exhibit, which is an entire bank account from beginning to end, Government's 286, all had their inception subsequent to June 1st, 1946. There is no dispute about that. Three of them were dated September 6, 1946, and one was dated September 12, 1946. And while they do show a dealing with corporate funds, and that cannot be disputed, I believe that within my understanding of the fifth count, i.e., a charge of a conspiracy subsequent to June 1, 1946, to obstruct the Government, to obscure from the Government the source of taxable income, that the mere fact that this is corporate funds does not exclude it; that it could very well be held by this jury, if they were so persuaded beyond a reasonable doubt, that the attempt, if there was this conspiracy, and if part of

the conspiracy [6443] was to transfer corporate funds subsequent to June 1, 1946, I say that is properly admissible. Now, the bank accounts themselves are not admissible as background material or any portions thereof prior to June 1st of 1946. But anything that the jury might find that these defendants did, beyond a reasonable doubt, if they do so find, with corporate funds with a view toward concealing or obstructing or obscuring the nature and source of this income which Klein subsequently exposed in his return, I say that it is admissible.

Now you differ with me, but I cant' help it, gentlemen—that is the way I see it. And on that basis I am going to sustain your motion to the extent of striking 286 except the three checks dated September 6, 1946, and the one check dated September 12, 1946.

Mr. Bender: Could you just hold that a minute, your Honor?

The Court: Yes, surely.

Mr. Kiendl: Your Honor, I don't want to backtrack at all, but I would like to call your Honor's attention to a ruling you made early in this case in which you said that (page 350):

> "The first axiom of admissibility is that [6444] none but facts having rational probative value are admissible."

The Court: Right.

Mr. Kiendl: "Thus a fact to be admissible must be agreeable to reason and intelligence and be sensible"——

The Court: Right.

Mr. Kiendl (Continuing):

"and must serve to prove the charge leveled against the defendants."

The Court: Right. I say, by that very formula, sir, I say that if these men conspired to manipulate corporate funds subsequent to June 1, 1946, to manipulate a flight of those funds, that might constitute the type of obstruction charged by the fifth count, despite the fact that they ultimately got those corporate funds by way of the distribution.

Mr. Kiendl: And there is no charge anywhere in the indictment or the bill of particulars that they manipulated corporate funds. The charge in the indictment and in the bill of particulars is that they entered into a scheme to defraud the Government in the exercise of its governmental functions——

The Court: That is right.

Mr. Kiendl: (Continuing) —by impairing [6445] obscuring, impeding and defeating the collection of their individual income taxes.

The Court: That is right. And I have held that the word "collection" is not limited to the process performed by the Collector. That was one of Commissioner Donohue's points in his brief. And he pointed out that before the fourth and fifth counts of the first indictment were supplanted by the first and second counts of the second indictment, the first indictment, the fourth and fifth counts, spoke of assessment and collection. Notwithstanding that, it is my opinion that the word "collection" as used

in the first and second counts of the second indictment, which became what we colloquially call the fourth and fifth of the consolidated indictment, that the word "collection" as used therein includes every means necessary and prior to a point where collection may be had.

Mr. Kiendl: Certainly.

The Court: All right. Now on that basis, it is my opinion that if these alleged conspirators transferred corporate funds for the purpose of obstructing the Government in determining their personal income tax liability, that that is admissible.

[6446] Mr. Kiendl: If your Honor please, there was no obligation on any of these corporations to keep their moneys in the City of New York or in the United States; they were foreign corporations.

The Court: That is true. But there may be inferences drawn from the fact that they changed the course of proceeding once those banks got notice to produce certain documents by a governmental agency. I think that the jury is entitled to have that for whatever inferences it may draw.

Mr. Kiendl: I don't want to labor the point with your Honor, but most deferentially I must say that I disagree with you.

The Court: Well, I assume, Mr. Kiendl, that you would not be on your feet arguing as vigorously as you have if you didn't disagree with me. But I think it is proper and I am going to adhere to it.

So the motions to strike 286 will be granted with the exception, as I stated before, of the three

checks dated September 6, 1946, and the one check dated September 12, 1946.

And that brings us to 287.

Mr. Kiendl: The same motion, your Honor.

Mr. Bender: The same motion, your Honor.

[6447] Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: With relation to that, your Honor, the Government opposes that motion only in so far as it contains the bank statement.

The Court: I am not taking any bank statements. I want checks. If you haven't got any checks showing the so-called flight of funds I am not going to let it in.

Mr. Bauman: I am referring to a different matter.

The Court: Excuse me. I thought it was a similar matter.

Mr. Bauman: The Cameron Stuart situation was one where that $3,000,000 went back and forth after a six-week period without an entry in the books.

The Court: I beg your pardon. 287 is the Cameron branch, up in Canada.

Mr. Bauman: That is correct.

The Court: Yes.

Mr. Bauman: What I am addressing myself to now is that $3,000,000 transaction about which I examined Rokoff, and accordingly I am resisting the application in so far as the bank statement re-

flects [6448] on September 25th a withdrawal of $3,000,000.

The Court: Isn't there a check there to cover that?

Mr. Bauman: Yes, there is.

Mr. Kiendl: From the United States to Canada?

Mr. Bauman: No, it isn't.

Mr. Kiendl: It is a Canadian transaction, your Honor.

Mr. Bauman: Let me withdraw the offer of the statement. I will limit it to the offer of the check, with the Court's permission. A check dated September 18, 1946, payable to Continentale for $3,000,000. That is all, sir.

The Court: Except as to the check dated September 18, 1946 for $3,000,000, the motions to strike Government's 287 are granted.

Mr. Bender: Your Honor, may I be heard just one moment?

The Court: You may not. I am getting a little bit tired of this, Mr. Bender. I have explained my point of view. And let me explain it once again to you.

I think this is admissible in connection with the fact that these items were excluded from the [6449] books of these corporations and the very exclusion may be taken by the jury as evidence, in my view, and if I am wrong, and if there is a conviction, they won't hesitate to reverse me—that if these exclusions were deliberately made by these defendants in order to obscure what they were doing, that that

may be the basis of a conviction under the fifth count, and for that reason I say that this $3,000,000 transaction in the Cameron account, even though it was up in Canada, is admissible. Let us not belabor it any more.

Mr. Bender: I am not trying to go back over what your Honor said with regard to the other exhibit. I want to make a totally different point.

The Court: All right, sir. What is it?

Mr. Bender: This is an illustration in my mind of where you have what is a transaction that the Government has not been able to prove had any real significance under any of the counts, even those counts on which you had acquitted the defendants.

The Court: You are talking about the weight of it now.

Mr. Bender: No. In this sense, what I am trying to say, your Honor, here is what ostensibly could be an exchange of two items. This jury is being left [6450] with the impression that here is $3,000,000 left off the books from which they are supposed to, without any proof as to what those items represent—on the pure suspicion, because the Government says, and they will argue to the jury, "Why did they leave it off the books?" And this jury is going to be told that they must have done it for one reason and that is to impede the collection or the determination of the proper tax due from Hyman Harvey Klein. But there isn't the slightest basis for such inference.

The Court: I know, Mr. Bender, but don't sum up to me.

Mr. Bender: I am not.

The Court: And if I were to take your rationale we might as well take the jury and send them home because there would be no issue of fact presented in there.

I think I have made my position very clear and you gentlemen have made yours very clear to me when you very forcefully as advocates disagree with me. And there is no use of our beating each other about it. That is my point of view as to the fifth count, gentlemen. You put your objections on the record, as you should as advocates, but understand that you are [6450a] doing your job and I am doing mine as I see it by my light, that is all.

Mr. Donohue: May I rise to ask the Court if we may have a ten-minute recess?

The Court: You certainly may, not only rise but also have the recess.

(Short recess.)

[6451] The Court: Now, then, that brings us to 288. Is that correct?

Mr. Donohue: Yes, your Honor.

Mr. Kiendl: Defendant Klein moves to strike it in its entirety.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes as to two checks, both being checks of the Chase National Bank, dated September 3, 1946.

Check No. 581557 in the amount of $346,200 made payable to Cameron Stuart Co., Limited, S. A.

The other one being No. 581558 in the amount of $252,700.

Mr. Bender: The same date?

Mr. Bauman: The same payee, the same date.

In support of those two checks the Government also offers from that exhibit two checks dated August 26, 1946, being numbered 112 and 113, 112 being made payable to the Chase Bank in the amount of $346,200, 113 being made payable to the Chase Bank in the amount of $252,700. That is all.

The Court: Well, the two checks that you [6452] mention later were the two that were made payable to the Chase upon which they drew their checks?

Mr. Bauman: That is precisely right.

The Court: I see.

Mr. Bauman: That is all in that exhibit that the Government offers.

The Court: Except as to the two checks dated September 3rd, 1946 and the two checks dated August 26, 1946, the defendants' motions to strike 288 are granted.

* * *

The Court: Motions granted.

289 is stricken.

290.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

[6453] Mr. Bauman: The Government opposes only in so far as that exhibit contains check No. 53, payable to the Royal Bank of Canada in the amount of $375,000. Also a check apparently not numbered, dated September 26, 1946, payable to Exportadora de la Costa in the amount of $17,476.13.

The Government consents to the remainder of that exhibit.

* * * *

[6454] The Court: All right. I agree with you; it should not be in twice if we can avoid it.

All right.

Except as to the check dated August 26, 1946 and the check dated September 26, 1946 the motions by the defendants to strike Government's 290 are granted.

* * * *

[6459] The Court: Motion granted.

302.

Mr. Kiendl: The same motion.

[6460] Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: There is one in here to which the Government will——

The Court: That is Regan Potter, New York branch of the Bank of Canada.

Mr. Bauman: There is a debit memorandum dated August 29, 1946, I am told.

There is such a debit memorandum dated August 29, 1946 in the amount of $475,000 bearing the notation "Transfer to Montreal."

There is one check dated September 27, 1946 payable to Regan Potter & Company, Limited, S. A., in the amount of $106,966.87.

The Government only opposes the motion with respect to those two documents.

The Court: Except as to the debit memo dated August 29, 1946 and check dated September 27, 1946, the motions to strike are granted.

303.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

[6461] Mr. Bauman: Your Honor, this is the file that relates to the safekeeping records, in the transfer, I believe it was, of 8 million dollars in Canadian securities. The Government opposes the motion in so far as the safekeeping records contained on the righthand side of the file and one letter dated September 12, 1946 signed by the defendant Klein directing the transfer of those funds to Canada (handing to Court).

The Court: I believe the motions to strike are placed on the record, gentlemen?

Mr. Kiendl: Yes.

The Court: All right.

Except as to that letter of September 12, 1946 the motions to strike are granted.

Mr. Bauman: And the safekeeping records, your Honor? The safekeeping register which appears?

The Court: You didn't mention that.

Mr. Bauman: I did, sir.

The Court: I am sorry. And the register contained in the said file is also excepted.

* * *

[6463] The Court: Motion is granted. 307 is stricken.

Government's 308.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: Would the Court just bear with us?

The Court: Surely.

Mr. Bauman: I am offering check No. 125, and by check No. 125 I am referring to Regan Potter check 125 dated August 26, 1946 in the amount of $453,000, payable to the Chase Bank. Also a cashier's check of the Chase Bank dated September 3, 1946 in an identical amount made payable to Regan Potter & Company, [6464] Limited.

Those two checks, as in the previous case, are part of one such transaction, the first check being used to obtain the second one.

The Court: Except as to the check dated August——

Mr. Bauman: Well, there is one more, sir. I am sorry. And there is one after that, I am informed.

Check No. 126, and that is Regan Potter No. 126, dated August 26, 1946 made payable to Chase Bank in the amount of $345,630, and a cashier's check of the Chase Bank dated September 3, 1946 in that amount.

A check dated September 27, 1946 made payable to Regan Potter & Company, Limited, in the amount of $194,761.48.

The Government opposes the motion in so far as those specified checks are concerned, and otherwise consents to the granting of the motion.

The Court: Except as to the two checks dated August 26, 1946 and the two checks dated September 3, 1946, and the check dated September 27, 1946, the motions to strike are granted.

* * *

[6465] The Court: That brings us to Government's 309.

Mr. Kiendl: The same motion, your Honor.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

Mr. Bauman: As to that exhibit, your Honor, the Government opposes the motions only in so far as two safekeeping records and a letter dated Sep-

tember 12, 1946, signed by the defendant Klein authorizing the [6466] transfer of safekeeping securities to Montreal.

The Court: As to 309 the motions to strike are granted except two safekeeping records and a letter dated September 12, 1946.

Government's 310.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: The defendant Alprin moves to strike.

Mr. Bauman: The Government opposes that application only in so far as a debit memorandum dated December 24, 1946 in the amount of $142,793.63.

Mr. Kiendl: Was that September 24?

Mr. Bauman: I have December 24 on that.

(Mr. Kiendl and Mr. Bauman confer.)

Mr. Bauman: That is the limit of the Government's opposition, your Honor.

The Court: All right, except for the debit memorandum therein contained, dated December 24, 1946, the defendants' motions to strike 310 are granted.

* * *

[6467] The Court: Motions granted and 312 is stricken.

313.

Mr. Kiendl: The same motion.

Mr. Bennett: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes only in so far as one check dated September 26, 1946, in the amount of $47,262.16 is concerned, made payable to the Seaboard Syndicate. With the exception of that check the Government has no objection to the remainder of the exhibit being excluded.

The Court: Except as to the check dated September 26, 1946, the defendants' motions to strike 313 are granted.

314.

[6468] Mr. Kiendl: The same motion.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes, in so far as safekeeping records contained therein are concerned, and the letter of Defendant Klein dated September 12, 1946, directing the bank to transfer safekeeping securities to the Montreal Branch.

The Court: Except as to the safekeeping records and the letter dated September 12, 1946, therein contained, the defendants' motions to strike Government's 314 are granted.

* * *

[6472] The Court: Granted. 319 is stricken.

320.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike.

Mr. Bauman: The government objects in so far as the check dated November 4, 1946, on the Royal Bank of Canada, payable to the order of Cameron Stuart, Ltd., in the amount of $3,000,000 is concerned. As to the remainder of the exhibit it has no objection to its being stricken.

[6473] Mr. Kiendl: Could I see that check?

Mr. Bauman: Yes, sir, (handing).

The Court: Except as to a check dated November 4, 1946, the motions to strike Government's 320 are granted.

* * *

[6474] The Court: Motions granted.

323 is stricken. 324.

Mr. Kiendl: I move to strike.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: Your Honor, I should call to the Court's attention that, first of all, this was a corporation formed in 1947, to the best of my recollection, and, as I remember it, is the corporation which was the transferee of the funds of Tivoli. Accordingly, I think that these records are material, and I will oppose the motions with relation to 324, sir.

The Court: Motions denied.

325.

Mr. Bender: Our motions are denied or——

The Court: Your motion to strike is denied.

325. Well, that is in the same category, is it not?

Mr. Bauman: Yes, it is, sir.

The Court: Assuming the motions having been made, they are denied.

* * *

[6476] The Court: Motions to strike granted.

333.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin urges its retention, if your Honor pleases.

Mr. Bauman: The Government opposes its being stricken.

The Court: May I know the dates of trans-[6477] actions involved in that La Importadora Marte file?

Mr. Bender: March of 1946 to January 1, 1947, according to my notes—I am sorry. I am on 332. I take it back.

Mr. Bauman: The first date I see in that exhibit, your Honor——

Mr. Donohue: May 5, 1947.

Mr. Bauman: —is May 5, 1947, sir. May 5, 1947 is I think correct, your Honor.

The Court: Now that was originally received as to the defendant Alprin. It was excluded as to the defendants Haas and Klein. They now move that it be stricken but the defendant Alprin wants it to be kept in the record. The Government has stated no position on it.

Mr. Bauman: I have indicated that I oppose the application to strike.

The Court: Motion denied.

334.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin urges its retention in the record, your Honor.

[6478] Mr. Bauman: Government opposes the motions, sir.

The Court: Motions denied.

336.

335 for identification having been excluded we now turn to 336.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin urges its retention, your Honor.

Mr. Bauman: Government opposes its being stricken.

The Court: Motion is denied.

337.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes the motion to strike, your Honor.

The Court: What are the dates involved in the file—earliest date? Is it the $35,000 check?

Mr. Bauman: March 19, 1947 shows a deposit of $35,000.

[6479] The Court: Motions denied.

* * *

[6482] The Court: Motion is granted and 345 is stricken.

346 for identification was excluded and that brings us to 347.

[6483] Mr. Kiendl: The defendant Klein moves to strike.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin urges its retention in the record, your Honor.

Mr. Bauman: The Government opposes its being stricken.

The Court: Motions to strike denied.

* * *

The Court: Now then 348.

Mr. Kiendl: I move to strike.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes.

The Court: Motion is denied.

* * *

[6486] The Court: That brings us to Government's 339, which appears to have been at various times treated in the record at pages 4075, 4410 and 4487, and from my notes is described as a file of

records kept by the Royal Bank of Canada, New York City Branch, pertaining to the Tivoli Trading Company, S. A., including signature cards, certified resolutions, correspondence, ledger sheets, deposit tickets and checks.

Mr. Kiendl: No motion by the defendant Klein.

Mr. Bender: The defendant Haas moves to strike.

[6487] Mr. Donohue: There is no motion by the defendant Alprin, your Honor.

Mr. Bauman: The Government opposes the motion to strike.

The Court: Motion is denied.

Government's 340 is, very briefly, the Montreal, Canada, Branch, of the Bank of Canada file re Tivoli.

Mr. Kiendl: No motion.

Mr. Bender: The same motion to strike.

Mr. Donohue: The defendant Alprin has no motion, your Honor.

Mr. Bauman: The Government opposes the motion to strike.

The Court: Motion by Defendant Haas is denied.

* * *

[6489] The Court: 357.

Mr. Bender: (To Mr. Kiendl) That is the statement by Alprin.

Mr. Kiendl: The defendant Klein moves to strike.

The Court: That was Alprin's affidavit of December 15, 1952.

Mr. Bender: I move to strike, your Honor.

Mr. Donohue: I move to strike, your Honor, on behalf of the defendant Alprin.

Mr. Bauman: The Government opposes the motion, sir.

The Court: Denied.

358.

Mr. Kiendl: The defendant Klein moves to strike as not bearing on the fifth count.

[6490] Mr. Bender: The defendant Haas moves to strike.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes the motion to strike, sir.

The Court: Denied.

359.

Mr. Kiendl: The same motion.

Mr. Bender: The motion to strike is denied?

The Court: Yes, when I say "Denied" I mean the motion to strike is denied. In other words, it is in under the fifth count.

The next one is Burke letter, which is 359.

Did you state a motion, Mr. Kiendl?

Mr. Kiendl: Yes, I said the same motion, I think, your Honor.

The Court: Oh, I am sorry, I didn't hear you. I was answering Mr. Bender at the time.

Mr. Bender?

Mr. Bender: I have no motion on 359.

Mr. Donohue: The defendant Alprin moves to strike, your Honor.

The Court: Motions denied.

* * *

[6498] The Court:

377, Continentale.

Mr. Kiendl: The same——

Mr. Bauman: I beg your pardon, Mr. Kiendl.

Mr. Kiendl: That is all right. The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: That is one of the corporations involved in the 3 million dollar failure to enter.

The Court: Well, while I personally can see no harm, I mean, I suppose if we isolate it to the specific journal entry pages that were involved that might be a refinement, but I can see no harm for the entire batch of pages going in. However——

Mr. Kiendl: No entry about the 3 million dollars. There is no entry——

Mr. Bauman: That is why there is no entry in the books.

The Court: Precisely. But I am saying, what I am turning over in my own mind and practically thinking out loud about is, whether I should confine it to [6499] the page where the 3 million dollars should have been entered and wasn't, or whether I admit the entire batch of ledger sheets which we are referring to as books.

Mr. Bauman: Well, the Government urges——

The Court: I will admit the entire page, and the motions are denied with respect to 377.

378 are the Cameron Stuart memorandum records.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Bauman: That is the other half of the same situation.

Mr. Donohue: Defendant Alprin moves to strike.

The Court: Motions denied.

379, Regan Potter.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: Now, your Honor, the Government opposes the striking of 379.

The Court: Motions denied.

[6500] 380 are the Tivoli Trading Company.

Mr. Kiendl: We have no motion regarding that.

Mr. Bender: Move to strike, your Honor.

Mr. Donohue: Defendant Alprin urges the retention in the record.

The Court: Haas' motion is denied.

381. Those were the balance sheets——

Mr. Bender: Trial balances.

The Court: —trial balances, profit and loss statements, as of December 31, 1946.

Mr. Kiendl: Defendant Klein moves to strike.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes the granting of those motions, sir.

The Court: Let's see. Those are the sheets where he didn't reflect specifically the million and a half loan as such.

Mr. Bauman: That is correct.

The Court: Motion denied.

* * *

[6502] The Court: 389.

Mr. Kiendl: No motion by the defendant Klein.

Mr. Bender: I move to strike.

Mr. Donohue: Defendant Alprin moves to strike.

[6503] Mr. Bauman: The Government opposes the motion to strike.

The Court: Motions denied.

388, received at page 4949.

Mr. Kiendl: No motion.

Mr. Bender: Move to strike.

Mr. Donohue: Will your Honor indulge me for just a moment?

The Court: Those are the five receipts for alleged repayment of the stock subscriptions to Tivoli, signed by Silver, $100; Rosenberg, $200; Alprin, $500; Roer, $1,000; and Koerner, 500.

Mr. Donohue: Defendant Alprin has no motion, your Honor.

Mr. Bauman: The Government opposes.

The Court: Haas' motion to strike is denied.

* * *

[6505] The Court: Defendant Klein's DW.

Mr. Kiendl: No motion.

The Court: That was the check.

Mr. Kiendl: The purchase of the Seaboard stock.

Mr. Bender: No motions.

Mr. Donohue: Defendant Alprin moves to strike, [6506] your Honor.

Mr. Bauman: The Government objects and moves to strike it.

The Court: Defendant Alprin's and the Government's motion to strike are denied.

DX.

Mr. Kiendl: No motion.

The Court: That is Rokoff's $150.

Mr. Bender: Move to strike, your Honor.

Mr. Donohue: Defendant Alprin urges its retention in the record, your Honor.

Mr. Bauman: The Government opposes its being stricken.

The Court: Motions by the Government and defendant Haas are denied.

Mr. Bauman: I said the Government opposes its being stricken, Judge.

The Court: I beg your pardon.

Well, defendant Haas' motion to strike is denied.

Defendant Klein's DY.

Mr. Kiendl: No motion.

Mr. Bender: Move to strike.

Mr. Donohue: Defendant Alprin urges its [6507] retention in the record.

Mr. Bauman: The Government opposes its being stricken.

The Court: Haas' motion is denied.

* * *

[6508] The Court: Defendant Alprin's EF-2 is stricken.

The next was Alprin's EG.

Mr. Kiendl: No motion.

Mr. Bender: I move to strike.

Mr. Donohue: Would that be Alprin's check?

The Court: That is the Alprin check to Tivoli for $500.

Mr. Donohue: I urge its retention in the record.

The Court: What was your motion, Mr. Kiendl?

Mr. Kiendl: I made no motion.

The Court: You made no motion.

[6509] Mr. Bauman: The Government opposes the motion to strike, your Honor.

The Court: Haas' motion is denied.

* * *

The next is Roer's EH which was Roer's check to Tivoli, received at page 5119.

Mr. Kiendl: No motion.

Mr. Bender: I move to strike.

Mr. Donohue: Defendant Alprin urges its retention in the record, your Honor.

Mr. Bauman: The Government opposes Haas' motion.

The Court: Haas' motion is denied.

* * *

[6510] The Court:

The next is Alprin's EI, certificate of incorporation of the Eagle Exporters, Incorporated, [6511] otherwise known as El Aguila Exportadora, S. A.

Mr. Kiendl: We move to strike, your Honor.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin has no motion, your Honor.

Mr. Bauman: The Government opposes the motions to strike.

The Court: This was the corporation formed by Valverde where de Cubas prepared the papers. Motions to strike are denied.

Alprin's EJ is the La Economica Agencias' translation of certificate of incorporation and by-laws.

Mr. Kiendl: No motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin has no motion.

Mr. Bender: I mean—excuse me—motion to strike, your Honor, not the same motion.

Mr. Bauman: Government opposes Haas' motion.

The Court: Haas' motion is denied.

The next is Alprin EK, Apollo Trading Company, translation of certificate of incorporation.

Mr. Kiendl: Move to strike.

[6512] Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin has no motion, your Honor.

Mr. Bauman: The Government opposes the motions of Haas and Klein.

The Court: Motions of Haas and Klein are denied.

Alprin's EL, La Importadora Marte, S. A.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin has no motion.

Mr. Bauman: The Government opposes the motions of Haas and Klein.

The Court: Motions of Haas and Klein are denied.

* * *

Government's 396 is the file containing records of the Bank of Nova Scotia pertaining to accounts of Compania Exportadora Fernandina.

Mr. Kiendl: Defendant Klein moves to strike.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike, your Honor.

Mr. Bauman: The Government opposes the motion.

The Court: Motion denied.

* * *

[6516] The Court: Granted. 403 is La Ribera. Now, that was one of the 12 companies——

Mr. Bauman: That is correct.

The Court: (Continuing)—and that was one that was sold by Roer to Haas.

Mr. Bender: Right.

Mr. Kiendl: The same motion.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike.

The Court: Denied.

* * *

July 5, 1955; 11:30 o'clock A. M.

[6534] Mr. Bauman: Before we get to that and only because until a pattern evolves I want to ask these questions as they occur to me, with the Court's permission, do I understand that in striking that part of the conversation I recognize that the effect of your Honor's [6535] ruling is to prohibit me from making any comment as to the fact that Koerner obtained the order without the prior authority of Williams, to Jacobs' knowledge?

The Court: Yes.

Mr. Bauman: That is the effect of it?

The Court: Yes.

Mr. Bauman: Is it also the effect that I may not comment on the fact that Koerner obtained the O. P. A. order period? The order being in evidence I just wondered—I realize what the limitation is of your Honor's decision, but may I not still say that this order was obtained by Koerner?

The Court: I can't see in what wise the fact that Koerner obtained the O. P. A. order is back-

ground for a conspiracy to obstruct the Government in determining income tax two and a half years afterwards. I still can't see it. I think that all you are trying to do is to keep as much of this prejudicial atmosphere around this case. And that is out. I think I allowed a lot in in the Government's case that probably should have been excluded, but I felt that we should get the entire picture. It was only because of that that I was secure in my conviction to grant the motions as to the first four counts. No, the fact that Koerner got the [6536] order—let us be realistic about it. The jury heard that testimony and I am going to order them to strike it out, and I am going to tell them to get in the corner and don't think about a pink elephant. And we can all stand on our heads, gentlemen, but these jurors know that Koerner—if perchance they forget it, I don't think they should be reminded. That is the point. But we can't erase it from their minds, we can't erase any of this testimony from their minds. We just live in the hope in this long protracted, complex trial that some parts of it that I now feel don't belong within the periphery of the fifth count they might have forgotten. They are not going to be reminded about it.

Mr. Bauman: I am trying to fix in my mind the effect of the granting of these motions because I don't want to transgress the spirit of the ruling, but I gather from the fact that the O. P. A. order is in evidence that I may make reference to the fact that such an order was obtained period.

The Court: Yes. You may make reference to the fact that a contract was entered into between Agencias and Duncan Harwood and that subsequently another contract was entered into between Agencias and R. C. Williams and [6537] that there was a supplemental contract to that. But as to all of the details as to how the original draft include the items that subsequently got into the supplemental contract and subsequently they were taken out and put into the so-called supplemental contract and that Klein said, "It will look better" or words to that effect, I don't think that belongs in under any circumstance under the fifth count, which charges a conspiracy commencing June 1, 1946, to obstruct the Government in the collection of income taxes of certain defendants.

Mr. Bauman: I have in mind with relation to the statement of Alprin's, "This is a tax situation," or tax problem which occurred at or about this time about which we are now talking, and the defendant Klein's statement, "It will look better to do it that way," or words to that effect, that that is proper background on whether Klein two years later——

The Court: Was tax conscious at the time.

Mr. Bauman: (Continuing) —had in mind the interference or impeding the Government in the fifth count.

The Court: I would suggest that we wait until we can isolate that, those conversations, and see what [6538] then.

* * *

[6542] The Court: Well, that runs, according to my analysis, for about 14 pages, so will you be good enough to indicate what is anything you say specifically falls into the admissible category in those 14 pages.

Mr. Bauman: I am thinking, sir, of page 231 to 234 or thereabouts.

The Court: Well, page 231 starts when you said to Mr. Jacobs, "And did you have a conversation with the defendant Alprin at that time?

"A. Yes."

I beg your pardon. It begins above that, after he identified Klein. He said he saw Alprin at his office a few days afterwards; Alprin was alone; they talked.

Did you say pages 231 to 232?

Mr. Bauman: From 231 to 234, your Honor.

The Court: Well, the only relevancy I could see is the fact that Jacobs was surprised about Agencias [6543] is on the sham question. I don't see any connection between that and the fifth count.

Mr. Bauman: Well, as bearing upon Alprin's later intent with relation to the fifth count I had in mind page 233 which has nothing to do with the sham corporation but a great deal to do with what Alprin had in mind and perfectly proper background as to the nature of Alprin's participation in the conspiracy alleged in the fifth count.

The Court: No, I can't see it.

Mr. Bauman: "He took out a paper. He showed it to me. I looked it over hastily and I asked him to leave it with me so I could study it and he said, 'All right, but please send it back to me.'"

The Court: I say that that means, if it means anything, that this corporation, in the light in which the discussion took place—Jacobs' story that he was surprised all of a sudden to see in the final draft or what was to be the forerunning of the final draft Agencias, that Alprin was just as surprised as he was because he said it was in the other drafts. But that is Jacobs' story, isn't it?

Mr. Bauman: Yes.

The Court: Alprin is then supposed to have [6544] said, Well, that was a tax situation. And I fail to see where that statement could be construed as going beyond at the worst from the defendants' point of view and the best from the Government's point of view, going beyond the first four counts. So they set up corporations to avail themselves of a right to avoid taxes, which millions of Americans are doing every day. I don't see where it indicates that at that time that was background that would lead up to a conspiracy starting June 1, 1946, to blind the Government as to the individual income tax liability of certain defendants. I just can't see it.

* * *

[6554] The Court:

* * *

We then come to testimony running from page 248 to approximately page 264, and I summarize that as being a conference at Jacobs' office two, three or four days after Alprin gave Jacobs the Haas tax opinion, Government's 8, at which Klein, Koerner, Alprin, Jacobs, Mengebier and possibly Jaburg were present.

[6555] Now that was the second big conference. And that was excluded only as to Haas.

Mr. Kiendl: The defendant Klein moves to strike that out on the ground that it doesn't go to the fifth count and it not proper background material.

Mr. Bender: The same motion.

Mr. Donohue: The defendant Alprin also moves to strike out, your Honor.

Mr. Bauman: The Government opposes, your Honor, on the express ground that those are the circumstances under which the contract which your Honor has permitted to be retained in evidence came to be executed and on that basis I submit it is proper background in explanation of that exhibit and the circumstances under which it came about, sir.

* * *

The Court: I will deny the defendants' motions [6556] with respect to the portion of the testimony beginning with the last question on page 248 and ending with the word "between" in the last answer on page 249—"between" and a couple of dots or dashes.

Mr. Donohue: May I most respectfully say to your Honor the portion of the testimony which your Honor indicates he will permit is with respect to an allegation made by the witness Jacobs that it was at the instance of the defendant Morris Alprin that the original contract was divided into a final contract and a supplemental letter. That of course, if it remains in issue, would be denied by defendant Alprin. And I take it that the Government in urging its retention is leading to the inescapable conclusion that as far as the Government is concerned there was and there still is but a single conspiracy, the same proof establishing the one in the fourth count as tends to establish the alleged conspiracy in the fifth count. I think it is now apparent that the only purpose for the Government's insisting on the retention of this bit of evidence is to establish that for some sinister purpose, in the light of Haas' tax opinion—and on that subject the witness Jacobs contradicted himself [6557] in cross-examination—the contract was separated; and if it was separated it could only have been separated for the purpose of making it possible to evade the tax due and owing to the United States personally by the defendant Hyman Harvey Klein under the fourth count.

Certainly the separation of the provisions of the original contract between Agencias and R. C. Williams could have no probative value with respect to a conspiracy alleged in the fifth count charging an attempt to hide, secrete or conceal income so as to impede the functioning of the Collector of Internal

Revenue and thus commit a fraud upon the United States, unless it is admitted for the purpose of showing that since there was a purpose to evade taxes, as charged in the fourth count, and that that purpose was sought to be attained by the defendant Alprin seeking a division of the contract, and therefore it may well be inferred by the jury that there was a like purpose to conspire to conceal income in the fifth count, the offenses being totally dissimilar. I think therefore the objection of the defendants is well taken and I urge your Honor to reconsider them.

[6558] The Court: Well, I don't think that even Mr. Bauman urges that the testimony that I identified is directly receivable as part and parcel of a conspiracy that started on June 1st, 1946.

Mr. Bauman: That is perfectly correct.

The Court: What is that?

Mr. Bauman: That is perfectly correct.

The Court: Yes.

Mr. Donohue: He says it may go to the jury. What does he mean by "going to the jury"?

The Court: No, he didn't say "go to the jury," he said, "go to the fifth count." And he defined his terminology "go to."

But in any event, we are admitting and allowing in an agreement, Government's 4, and the supplemental agreement, Government's 5; and I think anyone called upon to properly understand the dealings of the parties up to June 1st, 1946, so as to intelligently determine whether commencing June 1st,

1946, this alleged conspiracy took place is entitled to know why this rather unusual thing was done, i.e., a main agreement and then a supplemental letter.

Now, Jacobs in his testimony says it was [6559] Alprin's suggestion. You say that if this testimony remains in Alprin will have to take the stand and deny it. I say that that is a fair question of fact for the jury to decide, whether they will believe Jacobs or they will believe Alprin. I have my own notion as to whom they will believe when from Jacobs' mouth there came this:

> "Well, he (namely Alprin) stated that there might be changes in the secondary portion of the contract, and that he didn't want the main body of the contract affected by any changes so that if there were any changes to be made they would be made in the second part of the agreement."

Now the second part of the agreement, what does it deal with? It dealt with an order for a hundred thousand cases of liquor, it dealt with certain salesmen's commissions—it is completely—or let me say it is eloquent in its silence about anything involving taxes. But I do think the jury is entitled to know the background upon which these two documents came into existence. Under those circumstances I am going to adhere to my ruling [6560] and the portion that I identified heretofore, commencing with the last question on page 248 and terminating with the last answer on page 249—and

it is a partial answer—to that extent the motions to strike Jacobs' testimony is denied.

Mr. Bauman: I move the admission of that testimony against the remaining defendants.

The Court: Granted.

* * *

[6561] The Court: At page 264 and I summarize it in this language:

"At the second conference at which Klein was present there was discussion about Alprin's compensation."

Now that is the subject matter you address yourself to.

Mr. Bauman: Yes, sir.

Mr. Kiendl: We move to strike it out, your Honor.

Mr. Bender: The defendant Haas moves to strike out, your Honor.

Mr. Donohue: I move to strike, if it please your Honor.

I think there is no issue of fact but that the defendant Alprin received some $44,000 over a three-year period of time for legal services performed to the mutual advantage of the defendant Klein and of R. C. Williams, and that those sums of money which he received were promptly reported by him as ordinary income and the tax was paid, at least there is no evidence the tax was not paid. And I say to your Honor it was. Certainly it has no probative value [6562] with respect to an allegation

that the drafting of that amount of $264,000 was fraudulently claimed as a capital gain in the filing of his 1942 income tax return.

Mr. Bauman: Well, sir, may I say——

The Court: You don't have to. I am going to deny the motions to strike.

Mr. Bauman: I move the admissibility of that testimony against the remaining defendants, sir.

The Court: Meaning there of course Klein and Alprin. It was excluded as to Haas.

Mr. Bauman: I move its admission as to the defendant Haas.

The Court: Yes, I misspoke myself. Motion is granted.

* * *

The Court: Oh, yes, I will have to indicate specifically the portions. Thank you for reminding me.

It will start with the second question on [6563] page 264, the colloquy will be excluded therefrom—Mr. Bender's objection, Mr. Greenman's objection and the Court's ruling on that—down to the answer to the second question on page 265.

* * *

July 5, 1955, afternoon session, 2:15 P. M.

[6576] The Court: All right.

Now then, 432 brings us into Mrs. Lowy's direct [6577] testimony.

* * *

Mr. Kiendl: We move to strike.

Mr. Bender: The same motion.

Mr. Donohue: We so move, your Honor.

Mr. Bauman: Sir, as bearing on the circumstances under which the exhibits received in evidence were received——

[6578] The Court: Yes, I think I will permit that to remain as part of the so-called background material. Motions to strike that testimony are denied.

Now I am going to pause to isolate the particular testimony.

* * *

Well, I am admitting the portion beginning with the next to the last question on page 430, eliminating the colloquy on the second, third and fifth lines of 431, eliminating the fourth question on said page and the colloquy down to but not including the second from the bottom question on that page. You will notice that what I have called very inartistically the second from the bottom question is a repeat of the other, and there is no purpose in having them both in, one of them being unanswered, the witness being interrupted by an objection. And down to and including the first answer at the top of page 432.

Mr. Kiendl: Your Honor might I make a suggestion on page 430? Your Honor excluded all [6579] except the lower portion of it.

The Court: Yes.

Mr. Kiendl: Wouldn't it be a little clearer if we went up to where Mr. Bauman offered in evidence the exhibit, marked for identification the exhibit? Otherwise we won't know——

The Court: Well, that is agreeable to me. I mean, we will do that then if you prefer.

Mr. Kiendl: "Would you glance at these? Do you recognize those papers?"

The Court: Yes, it does not indicate what they are that she is being asked to glance at.

Mr. Kiendl: So if we start on the ninth line on that page it would be clearer.

The Court: All right. Starting with the words, "May I have these marked for identification as one exhibit?"

Mr. Kiendl: Yes, your Honor.

* * *

[6593] Mr. Donohue: Might I say at this time, your Honor, while normally I would move to strike all of the cross-examination of the witness Jacobs, in the [6594] light of the fact that your Honor has permitted as background evidence certain exhibits and certain testimony concerning the division of the contract into an agreement and a supplemental agreement, and for that reason only, I am going subsequently to move the admission of certain portions of the cross-examination.

* * *

[6604] Mr. Kiendl: Next, if your Honor please, is the testimony of the witness regarding a complaint he received from a man named Lannan regarding allocations. Koerner showed the witness an allocation sheet and said that if those who appeared on the sheet did not take their full allocation Lannan

could have the balance. The allocation sheets were the long yellow pages. Koerner said the allocation sheet could not be changed because it comes from Mr. Klein in Baltimore.

Mr. Bauman: "and this is final."

Mr. Kiendl: What?

Mr. Bauman: "and this is final," or the end of that.

Mr. Kiendl: Probably so. That is from [6605] pages 994 to 997. And we move to strike that on the same grounds.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin joins in the motion, your Honor.

Mr. Bauman: The Government opposes, your Honor.

May I say that this shows, I think this type of thing shows exactly the relationship between Koerner and Klein——

Mr. Kiendl: Between Koerner and Klein?

Mr. Bauman: —which resulted in the creation. if not the creation certainly in the subsequent participation in the fifth count conspiracy by Koerner. And for that reason, sir, the Government opposes the striking of this testimony.

The Court: Motion to strike as to this phase of the testimony is granted except that commencing with the second sentence of a question by the Court on page 996, beginning with the words, "Can you describe," and continuing until the end of the answer to the first question on page 997.

* * *

[6606] The Court: Gentlemen, I think it is necessary that we puncture this consideration of motions to strike and think ahead a little bit. After we get all through striking and not striking, what then?

I know I couldn't, and I will be presumptuous enough to suggest that nobody else in this courtroom who has been identified practically all of his waking hours with this case since the 4th of April, the Court and counsel, without reference to notes could not only tell what every exhibit is but beyond that certainly couldn't tell, after we conclude our labors, what was allowed in and what was stricken out, both by way of exhibits and also by way of testimony.

[6607] I daresay, and I don't think anybody will contradict me that the jury which just saw in the box and listened and didn't actually handle these papers and didn't have any previous understanding what the case was about could do that.

Now we want this jury to understand this case. I think the Government does and I think the defendants do because I think if ever there was a case where each side was firm in its conviction as to the fifth count that it was right this is it; and there are various techniques that can be employed. Number one, after we conclude our labors on the motions to strike I suppose I could sit down and tell the jury in probably two or three hours what was stricken out and what was allowed to remain in, a very ineffective process in the middle of a trial for one thing.

Or I could reserve it until my charge, which

would make the charge so inordinately long and confusing that the probability is that after the first hour the jury would be completely in the sky and wouldn't know what I was talking about.

Now there occurred to me one alternative, and that's what I want to discuss with you.

I thought if we made up, or if I made up that you would supply me with the few things that are [1008] lacking two dossiers, one prior to June 1, 1946 and the other subsequent to June 1, 1946. We will call them dossier A prior, B subsequent.

And in each portfolio there would be contained the exhibit still in evidence and the transcript of the record still in evidence of those small portions that I did not strike. And that I merely make mention after a very general recital of the facts, the highlights in the charge, make mention of the fact that we will permit the jury to take with them to the jury-room these exhibits and this testimony from the Government's case, and that they are to understand that in determining innocence or guilt under the fifth count they are to consider only these exhibits and this testimony coupled with whatever is adduced in the defendants' cases, which of course will not be given to them in the same form.

Now I don't know whether—and if any defendant objects to that, why, I will abandon it. But I have been very sorely troubled by the manner in which we will ultimately get to the jury what we are doing, and I would invite your comments.

Mr. Donohue: May I ask only a question, your Honor?

With respect to submitting to the jury two portfolios, A and B, each of us understanding the [6609] distinction between them, and with regard to your Honor's statement that the jury would be told that they could consider only these exhibits and this testimony, would your Honor make a distinction——

The Court: Oh, yes, I should have said that. They would be very carefully instructed that the contents of dossier A was only background to give them an intelligent understanding of what took place prior to June 1, 1946, but was not offered and could not be taken by them to determine guilt or innocence of a conspiracy allegedly starting after the contents of that folder.

Mr. Donohue: That is what I had in mind, your Honor.

The Court: Your riper experience, gentlemen, may bring to your mind some suggestion of some way to handle this, but I personally don't like the notion. I am very much afraid that if I were to say to the jury, "Well, you are not to consider exhibit so and so, and you are not to consider exhibit — and so, but you may consider exhibit so and so as background and you may consider exhibit so and so as having some bearing on the alleged conspiracy." —the fear I have in mind is that things that they have heard and things that they have observed in the way of exhibits that have been stricken may

enter [6610] into their reckoning either as background or as part of the conspiracy and we have no means of ever knowing just exactly what they do consider. Now this poses a very difficult and very delicate problem. I appreciate that. I have thought about it and I thought the best way to do it—normally what I do is a little bit different. I tell the jury, "You may have the exhibits if you want them." But this isn't the run-of-the-mill case where you only have half a dozen exhibits and if they want them they call for them. You have a lot of exhibits now that are out of the case. Of course I realize that there may be the danger in giving them *ab initio* the exhibits still in the case. That may overemphasize the exhibits in their minds; I don't know. But I think that we ought to at some point before we conclude, or before we bring the jury back in, try to come to an understanding of how we are going to translate into intelligent understanding by the jury, if we can, just what is left in this case by way of testimony and exhibits from the Government's case.

Mr. Kiendl: If your Honor please, as a matter of first impression it sounds like a very excellent program, but I wouldn't like to commit the defendant Klein to it immediately, I would like to think about [6611] it and confer with my associates. I would be very happy to do that.

* * *

[6620] The Court: Well then, I take it that the defendants now move that the entire testimony of

Salvatore excepting that appearing in the stenographer's minutes commencing with the third question on page 1145 and continuing down through the next to the last question on page 1149 and the answers thereto be excepted.

Mr. Kiendl: That is correct, so far as the defendant Klein is concerned.

Mr. Bender: The same as to the defendant Haas.

Mr. Donohue: That states the defendant Alprin's motion precisely, your Honor.

The Court: All right.

Now does the Government wish to invite the Court's attention to any specific portion of this testimony other than that excepted by the defendants in their motion to strike?

Mr. Bauman: No, sir.

The Court: Then the motion is granted.

* * *

[6622] The Court:

* * *

Now that brings us to Rudin's testimony [6623] which appears at page 1357 and concludes at page 1457, by coincidence just an even hundred pages.

* * *

[6624] Mr. Kiendl: We move to strike it out.

The Court: Well, yours is an all-embracing motion, I understand, to strike out all of his testimony?

Mr. Kiendl: Yes, that is right.

Mr. Bender: I join in the motion.

Mr. Donohue: I join in the motion, but because of the reservation of the testimony concerning the payment of commissions to the defendant Alprin by R. C. Williams I would except from my motion to strike the testimony of the witness Rudin the material beginning with the third question on page 1383 and ending with the second question on page— ending with the first question on page 1385 which is that portion of the testimony indicating that Mr. Rudin passed on and approved the payments for legal services to Mr. Alprin by R. C. Williams.

* * *

[0626] Mr. Donohue: I am sorry, your Honor, I would like to include up to the point where the transcript records that Government Exhibit 44 marked for identification.

The Court: I see, including the colloquy?

Mr. Donohue: Yes, your Honor.

The Court: Do the other defendants accept that exception from their motion to strike?

Mr. Kiendl: We accept that exception, your Honor.

Mr. Bender: I do, too, your Honor.

The Court: All right.

Mr. Bauman: I have no objection except for the colloquy starting with Mr. Becker and ending with Mr. Becker.

Mr. Donohue: I have no objection to striking the colloquy, if your Honor please.

The Court: All right, then the thing revised would bring us down to and including the last answer on page 1384, is that right, gentlemen?

* * *

[6627] Mr. Bauman: I believe this is in the category, sir, where your Honor had given a blanket exception.

The Court: That's right.

Mr. Bauman: And accordingly I am going to simplify my motion by moving that the testimony be received as to all defendants presently standing trial.

* * *

[6632] The Court: All right. Then under the circumstances the Rudin testimony is stricken on the defendants' motions, except the portion commencing with the third question on page 1383 down to and including the last answer on page 1384.

* * *

July 6, 1955, 10:30 o'clock A. M.

[6675] Mr. Donohue: May I rise to ask one question?

The Court: Let me ask you, are you going to throw a blanket on this conflagration or are you going to throw oil on it?

[6676] Mr. Donohue: I expect to throw some oil on it, your Honor.

The Court: All right. You are at liberty.

Mr. Donohue: Because I am faced with a problem, if it please your Honor, when we have concluded this onerous task, and I say as your Honor

said yesterday, "What then?" Then under a reservation of my privilege of making an opening statement I think it would be my responsibility then to attempt to tell this jury what I expect to prove in behalf of the defendant Alprin with respect to the fifth count.

And I find myself in a quandary, a morass that has been created only because the Government of the United States has created a monster in this indictment, as the result of which in an opinion, with which no rational mind could find fault, wherein your Honor, after twelve weeks of evidence, reached the inescapable conclusion that the allegations of the first four counts were negatived by the proof. We are now faced with responsibility for the remaining defendants of offering a defense as to the fifth count.

And my contemplation of what your Honor's [6677] thought was with respect to background material is best evidenced by my recollection of one of the potentialities or possibilities which your Honor suggested concerning background, being that your Honor might say to the jury that by way of background information the jury must keep in mind that some time in March or April 1944, as the result of negotiations between the parties, there was an agreement, the result of a number of drafts and a supplemental agreement and a tax opinion, in consequence of which whiskey was bought and sold and profits or income was earned.

But Mr. Bauman has insisted that there remain in the record, for example at page 248 or 249, a statement by the witness Jacobs that at one point in the negotiations the defendant Alprin insisted on a separation of the main agreement into a main agreement and a subsequent letter. And while I respect your Honor's view that this is unusual, from my own personal experience I have found it to be not unusual, that there are many instances where import commercial contracts are drawn in separate parts, as was true here.

Now that that has been admitted it apparently [6678] places upon me the burden of meeting the allegation that it is Mr. Alprin who insisted on the separation of the contract. Why is it admitted? Allegedly Mr. Bauman says it was admitted or is admitted for the purpose of background. I could find no fault with its original admission because it was obviously admitted to show that as a part of the alleged conspiracy for the purpose of creating sham corporations, as the result of a tax opinion, Mr. Alprin suggested, though it turned out later that the tax opinion had nothing to do with it, that the contract be divided into two parts.

So I can't orient myself to my duty or my responsibility if I am required to call, and if I am I shall, the defendant Alprin as a witness in meeting this issue in background material. We are creating an issue of fact, and I do not then envy your Honor's responsibility in attempting to charge the jury and

segregate in the jury's mind two kinds of issues of fact, an issue of fact on what we call background material—prior to the 1st of June 1946 you will have no problem, therefore I extend no sympathy; I should not say "no problem," not certainly as great a problem when you come to try to tell the jury what [6679] the fifth count means and what the measure of proof is required before they may reach a conclusion.

So I reach the conclusion that, though my friend of course will disagree and we have in some measure pleasantly disagreed, what we are in effect doing in the guise of admitting background material is at the instance of the Government permitting enough of the evidence which was offered to prove a conspiracy to evade taxes to prejudice the minds of the jury in the contemplation of the issue with respect to the fifth count, wherein, if I can understand it, the allegation is a conspiracy not to evade taxes but a conspiracy to defraud the United States by—and though I do not like it I will adopt your Honor's expression—throwing sand in the Government's eyes.

And so with respect to this question of dossier that may come up, maybe it will solve the problem. I can't conceive of it solving the problem, though I am not in opposition to. If the dossier which we shall call dossier A referring only to background material is contradictory, my original thought was, and I think it may have been originally [6680] at least your Honor's conception, that the background

material that would go to the jury would be matters about which there wouldn't be any controversy. If the Government had sought to introduce merely 2-A and 2-B and 4 and F, indicating the two drafts of the agreement, the final agreement, the supplemental letter, and the Haas opinion without testimony and without comment except that these were the things that were created, and indicating the relationship of the parties in their creation, I could have no serious objection.

But when in their introduction, added to certain testimony, there are created issues of fact which we must I assume defend, I take it if there are issues of fact in the background material I would be delinquent in my resonsibility if I did not seek to prove that it was not Morris Alprin who determined that there would be a division of the contract, or if it were Morris Alprin it was done for a reason not as a part of a conspiracy to evade taxes for a reason that is sound in the general and ordinary conduct of business affairs.

And so I say to your Honor I find myself confused as a result of this monster which the Govern- [6681] ment created when they added to four counts of an indictment, which I find no difficulty in understanding, a fifth count which seems to concern itself essentially with the 1950—1952 tax return of three people, only one of whom is here, a matter which I know, and I have asserted it to your Honor before, and my distinguished adversary has disagreed with me, a matter which at the instance of the Treasury

Department was considered by the Department of Justice—the 1947 tax returns of Koerner, Alprin and Roer in the year when the moneys were received and the Government of the United States let the statute of limitations pass on the 15th of March, 1954, advisedly and determinately, by refusing to institute a prosecution on those returns, and then in May 1954, after the statute has passed, they create this hybrid in the fifth count.

Now it is bad enough, as the Courts have said, to create a hybrid indictment with a combination of substantive and conspiracy counts, but when they confound confusion by adding a fifth hybrid conspiracy count which I find difficult to understand, I must respectfully say, and it is the only reason I am talking to your Honor at all, that in this [6682] attempt to determine which and what part of the evidence that has heretofore been heard with respect to all counts of the indictment may remain by way of background material pertinent only to the fifth count, in creating issues of fact we are I think inescapably going to create the necessity for meeting an allegation with proof that can be pertinent only to the four counts of the indictment which has been by your Honor in essence dismissed, and if we are required to do so we find ourselves prejudiced before a jury who may well say, well, if they didn't commit the offense, whatever it may be that existed in the fifth count there is now before us substantial evidence that they committed some offense and we may just as well find them guilty.

I think it must in essence redound to the prejudice and disadvantage of these defendants.

Mr. Bauman: I don't quite understand the—beyond the fact that Mr. Donohue is unhappy at the fifth count and the fact that it has been retained, I don't quite understand.

The Court: Well, now you are even. He doesn't understand your fifth count.

[6683] Mr. Kiendl: Everybody is confused.

The Court: And you don't understand him.

Mr. Bauman: I thought we were talking about striking the testimony.

The Court: I understand him, and possibly my understanding is bolstered by the fact that I have erected in my mind's eye the concept of two folders, one of them containing exhibits not stricken and testimony not stricken that had its inception prior to June 1st, 1946; the other containing testimony and exhibits not stricken with a recital as to those defendants as to whom it was excluded, having its inception subsequent to June 1st, 1946.

And Mr. Donohue has very eloquently persuaded me, and I am going to give you an opportunity, after I study the extent to which I had been persuaded, to dissuade me if we fight it out on this line until Christmas. He has persuaded me that I was apparently in error in allowing page 248 to go in. He has persuaded me that I am directing the very thing that I wanted to avoid and that was any issue of fact about any fact prior to June 1st, 1946. I was a little slow in getting there but I finally arrived, and under the wire, apparently.

[6684] My thought with respect to that dossier A was that it was to be no more than if I were to say to the jury very simply:

The only thing that you might consider that occurred prior to June 1st, 1946 is the fact that these parties negotiated, those negotiations came to an agreement, that 2-A and 2-B were in that agreement as drafts, that the agreement resulted in 4 and 5, and that during the period when these negotiations were going on there was in existence and known to some of the parties Government's 8. And carrying that on, as I imagine it would be carried on by the other exhibits, that thereafter there began the shipment of liquor from distillers in Canada to importers customers in the United States, and that shipment was under a certain mechanics or technique for a period of time, in 1944 the mechanics were thus and so with respect to Agencias; thereafter they were thus and so with respect to Ramsey Scott, and thereafter they were thus and so with respect to the other companies. And that is part of this background you may know also that in the course of these operations some seventeen Panamanian and Cuban corporations were [6685] formed and they were in a syndicate, some buying liquor, some selling the liquor, some acting as depositaries, and that is all. And now you are at June 1st, 1946, when the Government maintains that a conspiracy arose.

Now on the evidence in the Government's case, and on the evidence, and I am projecting myself to the point where I am talking to the jury, you under-

stand that, on the evidence adduced in the defendants' cases, assuming they take the stand, they will have taken the stand, you are to decide under the rules as I shall set them forth to you whether such a conspiracy occurred or not. And if it did, who was involved?

Now on the analysis I realize now that I made a very bad mistake in excepting from the defendants' motion to strike the Jacobs' testimony on page 248, and I am disposed to reverse myself, but I won't do so until I first hear from the Government, if it desires to be heard. But I want you to understand what my thinking now is, and Mr. Donohue has persuaded me of it. So that I am trying to explain to you, Mr. Bauman, that I don't share your misunderstanding or your lack of under- [6636] standing of what Mr. Donohue said. I realize now very fully the problem that confronts them, that they are being compelled to lead two categories of fact issues, and that wasn't what I ever intended by way of background. I didn't want any dispute as to anything that happened up to June 1st, 1946 because rather than have a dispute I would strike it altogether. But I think the Government is entitled to have background but it is not entitled to raise an issue. There is the distinction. And now at long last it has dawned on me.

Now you are invited to make whatever comment you choose, but I think I have indicated very clearly to you what I understood Mr. Donohue to have said, and if it isn't what he said at least that is what I think he should have said.

[6687] Mr. Bauman: It is what he says now, if it isn't what he said before, I have no doubt. But——

The Court: I understood him to have said it. But I think it is for him to say whether I have correctly paraphrased his argument.

Mr. Donohue: Without question, your Honor.

The Court: All right. So apparently, Mr. Bauman, although you did not understand Mr. Donohue's argument when he concluded it, after my elaboration upon it may I inquire do you understand it now?

Mr. Bauman: I understand you perfectly, Judge.

The Court: All right. Well, if you won't yield it is quite all right with me.

Will you suspend a moment? I have to read a note here.

(Pause.)

All right, Mr. Bauman.

Mr. Bauman: Well, I first want to dispute with your Honor the area that background testimony as such in a conspiracy case must be odorless, colorless and tasteless, because under the cases in this Circuit I respectfully submit that is not the law. One that comes to me, and I don't submit it as factually on all fours with this case, the first one that comes to my mind when your Honor was talking about background [6688] testimony and when various of the defendants' counsel were talking about it is the Witt case, where background testimony in that case con-

sisted of a bribe and a fix that was paid before the conspiracy charge ever came into effect. And of course when that came to be litigated the issue of whether that preliminary fix ever took place was hotly contested, sir.

The Court: What were they charged with having conspired to do?

Mr. Bauman: To fix tax cases.

The Court: To fix tax cases.

Mr. Bauman: That is correct.

The Court: And this was a prior fix?

Mr. Bauman: That is right, but it was taken not as evidence of prior similar acts, it was taken as showing how the conspiracy came into existence. That is the first case that comes to mind, and I respectfully suggest that I can submit many where the background evidence is something beyond the facts upon which the parties can agree, because when the test is: Can the defendants agree with the Government on what is proper background testimony, it places the complete control of the background testimony in the hands of the defendant for no better purpose than for them saying, "I dispute that and that is disputed in the record," so that in [6689] effect it gives them the complete control of what is background testimony.

And it seems to me that everybody in this courtroom must accept or face the fact—question, must face the question—under the law can background testimony be of an incriminating nature in the sense that it may put upon the defendant involved some-

thing that if the tax stands he may have to explain. And I suggest, sir, that a reading of the cases on conspiracy will not in any way bear out the theory, bear out the rule, if such it be, that background testimony must be innocuous testimony, because that is the point at which you have arrived here. I respectfully submit that is not the law and I don't think it should be the law.

The Court: What conspiracy do you charge here? I have stated it a number of times, as I understand it, and so have you, but in view of the fact that we must make an appraisal as to what is charged subsequent to June 1st, 1946, and what you propose to offer prior to June 1st, 1946, I ask you again, what do you charge in the fifth count? Let me specify. Do you charge that Government's Exhibit 4 and Government's Exhibit 5 constitute a concealment by the defendants named in count 5 of the nature of their business and [6690] the source and nature of their income for the purpose of impeding or obstructing the Government in the exercise of its tax-collecting functions?

Mr. Bauman: I think that what this shows—I wanted to consult a moment before answering you—but what I intended to say was that I think that this particular area with relation to the execution of the agreement in two parts and the part which your Honor has previously retained in the record shows an act in concert of a type which a jury might consider and properly consider in deter-

mining whether these two same people, Alprin and Klein, later with relation to the proceeds which arose under that contract on or about June 1st, 1946, entered into the conspiracy charged in the fifth count.

The Court: Let me ask you this question: Was there anything illegal per se in the drafting of the agreement between Agencias and R. C. Williams in two parts, Government's 4 and 5?

Mr. Bauman: Not per se, no.

The Court: All right. So immediately this case falls completely out of the orbit of the Witt case, because I will agree with you that fixing a Government official at any time is per se illegal, [6691] so I don't accept the Witt case as any authority for this proposition. The mere fact that these people conferred, I say to you in what way do you maintain that Government's 4 and 5 are proof of what I understand your charge to be in the fifth count? And I think you outlined it a moment before, and I take it your answer is "Yes."

Mr. Bauman: No, my answer is, your Honor, that it will tend to explain to this jury how it was when on or about June 1, 1946, the fifth count of conspiracy came into existence, how it was that Klein and Alprin were two of the conspirators, their prior relationship, their prior activities, their prior relationship with the Harwood deal, why it was Morris Alprin instead of one of fifty thousand people in the ball park was selected to become one of the conspirators in the fifth count, to do the

various things set forth in the fifth count, to hold not only his check but Koerner's check in three Cuban bank accounts in Mexico.

[6692] And I say that it is a fact from which the jury may draw the conclusion as to why it was that Klein and Alprin were conspirators in the fifth count. To that extent I submit it is proper background testimony. But, your Honor, I want to say further that standing by itself I could give you one circumstance and another circumstance and it is easy to demolish each circumstance. I say that the sum total of these background circumstances, the weight of those background circumstances, will explain to the jury the circumstances under which the conspiracy in the fifth count came into existence, why it was that Koerner, Roer—forget Roer—why Koerner, Silver, Rokoff and the other people mentioned—Alprin and the other people mentioned in the fifth count are presently charged with being conspirators. And it shows how that conspiracy came into effect and why they were the ones that were in it. And that is what I understand the basis of background testimony to be. Certainly the cases I think are clear to the effect that where you want to show how a conspiracy came into existence you may do so in advance of the actual, and indeed you must do so—in advance of the actual formation of the conspiracy. I don't think there is any question about that.

[6693] And you come then in this case, not proving the defendants guilty of the first four counts, not

proving anything other than how this fifth count conspiracy came into existence and way it was that Klein and Alprin and the other people mentioned in this criminal adventure in the fifth count became co-partners in that criminal venture.

To that extent sir, I suggest that the various circumstances——

The Court: Well, wouldn't you have enough if you got some portion of the testimony in that the agreement that became Government's 4 and Government's 5 arose as the result of conferences at which Klein, Koerner, Alprin, Mengebier, Jaburg, Jacobs conferred?

Mr. Bauman: I don't think so, sir. I think it is what happened at that one meeting, what happened where that thing was drawn up. It explains why it is in two pieces. And I think it is proper explanation to be had. If that places on anybody involved, or if he feels that it places upon him the duty to explain, that is not the responsibility of the law. That is his individual decision and his individual determination to make. But what the law does permit, I suggest, sir, is something beyond a stipulated statement of facts on what the background information was.

[6694] The Court: Well, I will think about it. I am not making any ruling. I understand Mr. Donohue's point and I will think about it, and I understand the Government's answer to his point—at least, I hope I do.

* * *

July 6, 1955, afternoon session, 2:15 P. M.

[6698] The Court: Mr. Donohue is to be complimented on his powers of persuasion, but upon re-

flection and looking at some of the law I am disposed to adhere to my original ruling. I think the complete answer has been given to the position that you espoused this morning, Mr. Donohue, by Judge Learned Hand in his decision in the Dennis case, and I will read the portions to you that I say is the complete answer and far more closely an answer than the Witt decision, Mr. Bauman.

Dennis was at 183 Fed. 2d 201, and the portion that I refer to is at page 231, and here is what Judge Learned Hand said with regard to something that appears to me to be a fairly close parallel to what confronts us in this trial:

> "In another regard he"—and by "he" he means the district judge—"also favored them"—meaning the defendants—"more than he need have. He charged the jury that they should use no declarations against any defendant, save those made by him himself, unless they were made within the period laid in the indictment. There can be no logical reason for limiting evidence to prove that the defendants were in a conspiracy between 1945 and 1948 [6699] to the period of the charge; if they were in the conspiracy earlier, declarations of any one of them or of any other person acting in concert with them are as competent as those made within the period laid. Whether they are relevant depends upon how far they form a rational support for believing that the conspiracy continued to 1945; but it is nonsense to say that events occurring before a crime,

> can have no relevance to the conclusion that the crime was committed; and declarations are no different from any other evidence. How far lack of the commission of the crime one may go is a matter of degree, and within the general control of the judge over the relevancy of evidence. In the case at bar, there is not the least reason to hold that his discretion was abused. The same doctrine applies to evidence occurring before the acts charged had become a crime at all: e.g., in the case at bar the visits of some of the defendants to Moscow before 1940. Just as in the case of events occuring before the dates laid in the indictment, so events occurring before the conspiracy had become a crime, may have logical relevance to the conclusion that the conspiracy continued until [6700] after 1940. It is *toto coelo* a different question whether we are treating them as ***media concludendi***, or as the factum itself."

Judge Hand then goes on to analyze certain cases where the prior declarations were held to have been too remote and continues:

> "We are not in accord with this reasoning; and it follows that we regard the admission of evidence of what any of the defendants did before the Smith Act was passed as competent and relevant. Indeed, it would have been equally so, had its use not been confined, as it was, to the individual defendants concerned: that is, it would have

been, had the judge concluded, as well he might, that already all the defendants were engaged in the same enterprise that was charged against them in the indictment. The only question that could arise was whether the interlude of the Communist Political Association between May, 1944, and July, 1945, made what was done earlier too remote rationally. Clearly the interlude did not do so. We hold that all the declarations were competent and relevant."

Mr. Donohue: Will your Honor give me just one minute?

The Court: Surely. I will give you more [6701] than one minute. I will give you an hour if you need it.

Mr. Donohue: I find no fault with the decision of Judge Hand, whose opinions I have learned to respect as soon as soon as I was able to read them, but I point to your Honor what I think is the significant error into which I think we are permitting ourselves to fall. First with respect to the Witt case and then let me come to the Dennis case. As I understand the theory of the Government in the Witt case where one is charged with the offense or conspiracy to fix a tax case, that evidence of an alleged attempt to fix a tax case before was properly admitted relating to the intent of the parties with respect to the current indictment. With that I find no fault.

I certainly find no fault with Justice Learned Hand in the Dennis case when he indicates that

conduct engaged in by Dennis and his co-conspirators which predated the date of the conspiracy was properly admitted as reflecting to the mind of the jury what they really intended to do during the period of time set forth in the conspiracy.

Or that Judge Learned Hand found that there was no error in the court in permitting testimony of [6702] events which occurred such as a trip to Moscow before the time set forth in the indictment.

But the error we have fallen into is to overlook the fact that the evidence that Mr. Bauman is seeking to introduce here is evidence which was introduced before this Court and jury to prove an offense alleged in three substantive and one conspiracy count of an indictment which has been dismissed by this Court.

The Court: On what do you base the conclusion, if I may interrupt you—on what do you base the conclusion that the Government introduced that evidence solely for that purpose?

Mr. Donohue: Well, the conclusion is inescapable, if it pleases your Honor, when the Government offers evidence that the defendant Morris Alprin, for example,—and I assume he would be subjected to cross-examination on the point—back in April of 1944 and March of 1944 with respect to an agreement insisted that the agreement be divided. I most respectfully say to your Honor that that could not, under any possible conception of law or of fact be evidence properly admitted to prove, if we were try-

ing this fifth count de novo, the conspiracy alleged [6703] in the fifth count of the indictment.

The Court: Well, isn't that for the jury to determine ultimately, the fact beyond a reasonable doubt, that this evidence—whether or not this evidence constituted an indicia of an intent, or putting it down to a fundamental—whether the splitting, assuming they believed Jacobs that Alprin recommended it, and assuming that they disbelieved Alprin's—I am assuming he will take the stand and deny it and tell a different story. Now of course that poses immediately a question of fact for the jury to determine, about which you complain, as to things that happened prior to June 1, 1946.

But, assuming that the jury rejects Alprin's version and accepts that of Jacobs', could they not then find that the splitting of the contract among other things, happening both before and after June 1, 1946, resulted in an inference, to them beyond a reasonable doubt, that there was a conspiracy to hide something from the Government?

Mr. Donohue: I am terrified, your Honor, that they might so find, and I think with due deference to your Honor that it is not a question for the jury to speculate on that subject matter; it is a question for [6704] your Honor to determine here and now whether that evidence was properly admitted to the jury feeling that they might so conclude with respect to evidence that was introduced in a matter that I most respectfully say to your Honor led to an acquittal on the part of three defendants who were in those four counts.

The Court: Well, I think they are entitled, and I accept the responsibility that you pose, and correctly so, and I think they are entitled to make the determination, and it is not for me to stifle that determination whether the splitting of the contract coupled with the number of things that happened after June 1, 1946, lead them to the inference beyond a reasonable doubt that the crime charged in the fifth count of the indictment was committed, i.e.,—and I think that is the Government's position—that the splitting of the contract coupled with the so-called flight of funds, coupled with the giving of the checks to Koerner, Alprin and Roer, and coupled with the holding of those checks in one case for three years and in another case for five years, coupled with a number of other things—whether all of those put together, each being received at least subsequent to June 1, 1946—a process by the way that I have indulged [6705] in that Dennis criticizes—each being received only as to the defendants that were concerned therewith—whether putting all those little pieces of the jigsaw together to construct one picture, whether the jury as the ultimate triers of the fact should not be given the opportunity of saying or inferring beyond a reasonable doubt whether this conspiracy really came into being.

And the only obstacle to that is the obstacle of remoteness, as I read the Dennis case. And remoteness I don't feel enters into this picture.

Now I don't say that remoteness is gauged solely by the calendar, i.e., that because something that

happened in 1940 in the Dennis case was not too remote in an indictment charging to begin in 1945. I don't think that is the test. But I do think the test is relative. And in this particular case what happened at the inception of the Harwood arrangement in April of 1944 is not too remote, which I recognize as the only basis that would render it incompetent—is not too remote as to what happened in June of 1946.

[6706] Mr. Donohue: May I only conclude by making one suggestion, your Honor. Does your Honor conceive it possible that in the Dennis case, for example, had there been an indictment of the parties in the Dennis case for conduct that had occurred prior to the date alleged in the ultimate indictment, after a trial by judge and jury there had been an acquittal, would that same conduct be then used as background information in the subsequent or later indictment? I think that parallels our situation here.

The Court: You see, Mr. Donohue, the difficulty is this, I have not been able to find a case, I don't say none exists, but I have not been able to find a case where the Government has heretofore ever done what it is trying to do in this case. I recognize the fact, and I am quite alive to it, that what they have done here is charge three substantive counts for tax evasion, and aiding and abetting in these three substantive counts by others, a conspiracy count for that tax evasion and then virtually on the same facts an independent conspiracy. I am alive to it. I recognize that. And I frankly say to you that I am not

prepared to say that they cannot do that. If perchance there were a conviction in this case and if perchance they [6707] were sustained, this would become a bellwether case for the Government, because I will say to you without Congressional relief we would all be in a rather precarious position—this would be extending the prosecutor's darling of a conspirators' count to an absurdity. But I say to you that I recognize the fact that under the law as it exists today the Government has that right and they have chosen, unhappily for these defendants, this vehicle for testing it.

Now if as I am concluded they do have the right to charge two conspiracies, one not canceling out the other, two separate crimes—of course the best and most fundamental example that I could think of was the example of the assault with a gun constituting two crimes—and if the Government is sound in that position, and I see nothing to challenge it, then I say to you that the hypothesis that you pose is not valid, because you are supposing that there was a trial on these facts and that one would act as res judicata or a judgment in bar of the other. I say to you that I didn't recognize that fallacy in the Government's position in this case.

Mr. Donohue: Would your Honor indulge me for just a moment, please?

[6708] The Court: Certainly.

Mr. Bender: While Mr. Donohue is catching his breath, can I just say one thing, if I may.

I think our confusion, or, at least, let me say that my confusion results pretty much in not rec-

ognizing that the test of identity of offenses is whether the evidence is the same to sustain both crimes. If the evidence is the same then you have one crime, even though it may be set out in language as two distinct ones.

Now if the background information here as we now see it is evidence from which the jury can be permitted to infer a conspiracy as charged in the fifth count, then in effect what we are saying is this, that you had one conspiracy between all of these defendants as charged in the fourth count which had two diverse objects, we will say, one to attempt to evade taxes by concealing and by reporting what should have been ordinary income as capital gains and two, a similar type of conspiracy to commit the same thing but involving Alprin, Roer and Koerner.

The Court: Well, let me interrupt to ask you a question. If what you say is so, then regardless of the motion by the defendants for a directed verdict of acquittal as to the fifth count it would appear now that [6709] a motion to dismiss the fifth count might lie——

Mr. Kiendl: We are going to make such a motion, your Honor.

The Court: On the theory that the facts pleaded in support of the fifth count were the identical facts pleaded in support of the fourth count. Now of course there if the fifth count were dismissed as distinguished from a judgment of acquittal, the issue of law as to whether it stated a crime under all the evidence thus far developed in the trial, regardless

of what a motion judge might have done when he didn't have all the facts before him, would then pose a situation that would be appealable by the Government, is that right?

Mr. Bender: I believe so. The only problem I have in mind in answering your Honor's question, and I am not prepared to say this with any definiteness, is whether or not a motion to dismiss might not be considered in the nature of a judgment of acquittal, even though it may be framed in terms of a motion to dismiss, not that I am making it, but I am only referring to what Mr. Kiendl said, although I had a similar problem just recently before the Second Circuit Court of Appeals that Mr. Bauman knows about.

[6710] The Court: Wait a minute. Let us not get off the track. I have denied the motion for judgment of acquittal and I have denied it upon the proposition, and I must confess that this had to be the basis, upon the proposition that regardless of the identity of the facts the Government could charge two conspiracies, one to attempt to evade, the other to obstruct. We will use that in the general sense referring to the fifth count.

Now we agreed on the test of judgment of acquittal and that was what a reasonable person might find. And I say that if the Government is on sound footing that the same facts can establish two crimes, i.e., the conspiracy under the fourth and the conspiracy under the fifth, and if the Government is on sound ground as to that, then in my view of the

evidence the motion for judgment of acquittal had to be denied with respect to the fifth count.

[6711] So that brings us back then to the basic question, is the Government on sound ground in asserting that the same facts may prove two separate conspiracies? And that I say to you is a question of law.

So that it would appear to me, and I am just thinking out loud, and probably a very dangerous process at this stage, but I will do it nevertheless, and I have been known to be foolhardy on more occasions than one, that it might not be inappropriate for the defendants now, right at this moment, to move to dismiss the fifth count and then let us get an Appellate Court, if the Government is so disposed, to answer the question that has been posed by the fifth vis-a-vis the fourth count, is the Government on firm ground.

Am I right or wrong in saying they are or they are not?

Mr. Bender: May we have fifteen minutes?

Mr. Bauman: Your Honor, before we get to that, I think that we are confronted with the situation where everybody is assuming that the same facts are charged as constituting crimes set forth in the fourth and fifth counts. That is not the fact. The same [6712] facts are not so charged. They are two separate conspiracies, and the reason that they are two separate conspiracies is because one of them relates to a completely different area of facts which your Honor has been striking out in no small part,

I venture to say with my consent, because I recognize that in the light of your Honor's decision those facts which went to the fourth count were neither background evidence under the fifth count nor were they proof under the fifth count.

The Court: In order that I may understand you, I think I know what you are driving at, may I ask a question and probably save you the labor.

For example, are you saying that the filing of the Koerner, Alprin and Roer returns in 1952 and 1950, respectively, and that the transfer of funds from the New York banks to Canada were not offered as proof of an attempt at evasion by Klein of his 1944, '5 and '6 income by filing in March 1948 the 1947 return? Is that what you are driving at? In other words, what happened subsequent to Klein's return for the year 1947 couldn't in any event have been addressed to the first four counts.

Mr. Bauman: I think that is basically so.

[6713] The Court: I see what you mean. So then you are arguing that we don't have an identity of facts.

Mr. Bauman: Precisely, we have no identity of facts because——

The Court: At least from March 1948 on.

Mr. Bauman: Agreed: And there is a possibility that some of the facts, some of the facts, may have been admissible on both counts, but certainly not all of the facts, and your Honor recognized that during the trial with relation to the various returns about which your Honor has just stated——

The Court: Yes.

Mr. Bauman: —when you received them as to the defendant Klein on the fifth count.

The Court: Yes.

Mr. Bauman: And I urge upon the Court that, well, certainly I urge upon the Court my own denial of the fact that these same facts are meant to constitute the basis for the fourth and fifth counts. That, sir, I respectfully submit is not the case.

The Court: Of course you acknowledge the fact that to some extent facts that occurred prior—I said March 1948, I should have said May 1948—[6714] that facts that occurred prior to May 1948 might come into play with respect to both counts.

Mr. Bauman: I would be less than frank if I said anything less than that.

The Court: I see.

Mr. Bauman: But I say, based on the pleading in the indictment, Judge, where Morris Alprin holds two checks until 1953 which by every standard, your Honor, is strongly admissible on the fifth count and is indeed specially pleaded on the fifth count, not so much in point of date but the situation is set forth —now that, sir, is a perfect example of a fact that I think wouldn't go to prove the fourth count or the first three.

The Court: I understand.

Well, gentlemen, I think I have indicated to you, as unhappily as the result may have fallen, that I am disposed to accept the language in the Dennis

case as conclusive of what we are going to do here. Now, that would require a reconsideration of that testimony on page 627 which——

Mr. Donohue: May I say that my associate has done some research on this question of identity of facts. I don't know whether your Honor wants to [6715] hear it at this time or not.

The Court: I am persuaded by Mr. Bauman reminding me that subsequent to May 1948 anything that occurred wasn't offered by the Government nor could it have been accepted as being indicative of any crime charged in the first four counts.

Mr. Donohue: I do not recall it was offered for any such specific purpose at the time it——

The Court: No, but if that is so that simply dispels the notion that I had a moment ago when we were just beating this out to some sort of conclusion, that you could have an identity of facts because there are facts that occurred subsequent to 1948 that addressed themselves to the fifth count alone.

Mr. Kiendl: Your Honor, may I suggest in that connection that if that be so, nevertheless everything that transpired up to and prior to May 17, 1948 would be res adjudicata under your Honor's ruling on the motion for judgment of acquittal. That is what we are contending. Every fact where the facts were identical up to May 17, 1948 is forever adjudicated by your Honor's disposition of the motion [6716] for judgment of acquittal.

The Court: No, I don't think that is so.

Mr. Kiendl: We have a case that—I haven't got the reference to it here, but we have one case that Mr. Meagher calls my attention to which we will give you tomorrow morning.

The Court: I will be very happy to read it. At this moment I don't agree with that conclusion. But I would be very happy to read that case. In any event——

Mr. Donohue: Would your Honor hear Mr. Goldstein?

The Court: Surely.

Mr. Goldstein: Your Honor, Mr. Bauman has suggested that the reference to the Alprin return and the other returns were offered only as to the fifth count and couldn't have been accepted under the fourth count. What I would like to point out is that among the overt acts alleged in furtherance of the conspiracy in the fifth count there are two, one a conversation between Alprin and Klein in February 1949, which as the record indicates has to do with the Tivoli situation and taking the check from Canada back to the United States, and a conversation between [6717] Roer and Klein, which on examination of the record will again be seen to have to do only with the Tivoli situation.

Now when that is taken together with the reference in the fourth count in paragraph 17 that all of the acts described in paragraphs 5 through 16 of the fourth count were for the purpose of concealing, aiding and abetting the evasion of income tax of the

four principals, and coupled with the allegation in paragraph, I believe it is 2 and paragraph 4 of the fourth count, that the purpose of those acts, the formation of Agencias and I think the presence of Ellis Rosenberg at a bank, were for the purpose of concealing or covering up the nature and source of the income—I think that what we have in the fourth count is a conspiracy to evade taxes and to conceal evasion of taxes. In other words, it is a single conspiracy having a dual purpose, having diverse objects.

This was precisely the sort of conspiracy that was involved in the Manton case, where the conspiracy was to obstruct justice and to defraud the United States——

The Court: By robbing it of an honest [6718] official.

Mr. Goldstein: Yes.

The Court: Yes.

Mr. Goldstein: In that case the Court said, quoting Frohwerk v. United States, I believe it was, that the conspiracy is one, no matter how diverse its objects. In other words, if the object of the single conspiracy was to violate the statute dealing with obstructing justice and also to violate the statute which we have here, defrauding the United States, it is still one conspiracy.

Now, this was taken up in the May case which cited with approval the rule established in the Manton case, that a single conspiracy, the same set of

facts to which your Honor had adverted, if there was a dual purpose it is still one crime.

I would like to point out that it is different from the situation of the gun. The situation of the gun is a single fact situation which gives rise to two offenses because there are two statutory offense categories into which the single fact situation will fall. This is entirely different from the conspiracy situation, where the conspiracy is the [6719]crime, as has been said in the Manton case, in May v. United States, in Frohwerk v. United States, and in the Braverman case, and the Braverman case is perhaps the best illustration of that, because there you had a single conspiracy involving the violation of half a dozen statutes.

If your Honor's view that the same facts can be used to establish separate offenses is applicable to a conspiracy situation, then I submit that in the Braverman case you would have had six offenses, not one. And the Supreme Court unequivocally rejected that contention.

Now coming to the facts in this case we are faced with a very strange anomaly to me. We have in the fourth count paragraphs 2, 4, 5 through 16, which is virtually every paragraph alleged in the fourth count, and specifically refers to concealment or covering up the nature and source of the Harwood picture.

Then we come to the fifth count, and everyone of the paragraphs there, beyond the first paragraph, paragraphs 2 to 6 refers to the same thing as being

the purpose of the conspiracy. Obviously you had a common purpose to these two separate [6720] conspiracies which Mr. Bauman is referring to. He says they are two separate conspiracies. It is our position that on the evidence there is no basis for saying they are separate conspiracies. If there were conspiracies at all here they were the same conspiracy to encompass evasion and concealment. That is one, that is not two. You can't split them into two counts.

I think this is best illustrated by examining the overt acts. The only overt act which is left in the fifth count, as I understand it, is the conversation between Alprin and Klein in 1952. When we are referring to Alprin's statement it has to do with the release of Alprin's check or bank draft. The very same bank draft is involved in the conversation referred to in the overt act in the fourth count, about the conversation between Alprin and Klein in 1949. So we have one aspect of the situation is supposed to have been in pursuance of the conspiracy in the fourth count. The second aspect of the same subject matter is supposed to have been in pursuance of the object of the conspiracy in the fifth count.

I think we are dealing with semantics here. [6721] The Government it seems to me clearly has in mind that the fourth and fifth counts are not identical because they have sought to set it up as an independent offense. They said the fifth started in June 1946. But what the fifth count is, it seems to me, clearly, is one facet of one aspect of the

fourth count. They have taken a piece of the Tivoli deal, not even all of it, because part of the Tivoli deal is specifically referred to in the fourth count as being in pursuance of the conspiracy referred to. They have taken one piece of the Tivoli deal, the Alprin, Roer, Koerner return, the Tivoli entries, and set up separate counts on it.

Now, what they have done is to take some of the means of concealment which they could just as well have referred to in the fourth count as they did with the Koerner—with the Roer and Alprin conversation with Klein having to do with Tivoli, they could just as well have taken the returns and put those in the fourth count. But it is an artificial device and one having double aspects of putting it in the fourth count, and certainly putting them in the fifth count cannot support the separate [6722] count.

I think we are clearly within the meaning of the rule in the Manton case and in the Frohwerk case and that the Government really repeats that fourth count charging a conspiracy to evade taxes and to conceal, and the fifth count has taken a part of the concealment referred to in the fourth count and set it up as a separate count.

The Court: I am familiar with the Manton and Braverman cases but I am not with the Frohwerk case. I don't have a recollection of having read that at the moment. When I said I was unable to find a case I was indicating to you that I was unable to find a case where an attempted evasion of taxes was

in one part of an indictment and then a conspiracy under 371 to obstruct was in another part of the indictment. I know that there had been these cases like the Manton case, where they held that the two facets may be one overlap, and Braverman the same thing. I haven't been able to find a case where the specifics that are presented here have been before presented. Of course unfortunately for me I haven't, and if I had I might get all the answers to all the questions. I know [6723] you are drawing a parallel and you are saying that the reasoning in one applies as well as though it might have been an income tax case.

Mr. Goldstein: For this reason, 18 U. S. C., 371, is in two parts. The first part is a conspiracy to commit an offense against the United States. The second is a general catchall to defraud the United States.

In the Manton case the conspiracy to obstruct justice was based on the first portion because there is a statute dealing with obstructing justice, and then there was the second, defrauding the United States. I say it is identical here because there is 145(b) dealing with evasion of tax, so that you have here in the one indictment out of the same general fact situation an attempt to join together a conspiracy to commit the offense of income tax evasion and a conspiracy to commit the offense to defraud the United States, as in the Manton case there was a conspiracy to obstruct justice and to defraud the United States.

Now it seems to me that the point is established beyond any peradventure of doubt when we analyze Mr. Bauman's references before the first [6724] four counts were dismissed as to what is meant by these various counts, and time and again he refers to the fact that the fifth count had to do with a cover-up of the nature and source of the income of the Harwood deal. And then in referring to the first three counts and in the fourth count—I remember when he offered Koerner's 1947 return he tried to get it in on the same basis as to the first three counts, and the fourth count also encompassed the nature and source of the income from the Harwood deal.

I don't have it presently available, I have it in the library upstairs, but his statements throughout the record indicate and parallel completely the theory that I have offered here. He says there was a separate independent conspiracy. I say that is semantics. He says there is and his indictment says there isn't. His statements throughout the record indicate that there isn't and the evidence in this case, as indicated by the problem we are having with background, indicates that there isn't, and if there was a conspiracy it was one and the same. And I respectfully submit that the one conspiracy cannot be separated and put into separate counts.

[6725] Mr. Bauman: I would merely say that I think your Honor summed it up better than I can in dealing with the motions, in a sense, or perhaps I can't place my finger on it in the record, but your

Honor has come to the conclusion certainly in connection with the motions that the conspiracy alleged in the fourth count didn't exist, and your Honor has said, at one occasion, you may recall, that if, as and when the time comes to submit this case to the jury your Honor had in mind to tell the jury that even in fact no matter what conspiracy—I don't know that you had it in mind to say it to the jury, but you had it in mind in any event, no matter what kind of conspiracy might have existed before June 1st, 1946 the only question that they would be permitted to determine is, on or about June 1st, 1946 did a conspiracy come into being for the purpose set forth in the fifth count. That is what I understood your Honor to say, and that I respectfully submit is a factual determination which the jury can make upon adequate basis in the record.

The Court: I am disposed to agree with you.

* * *

[6726] The Court:

* * *

[6727] And so there will be excepted from the granting of the defendants' motion to strike the testimony of Jacobs subsequent to his direct testimony, that testimony appearing on page 627 and 628 of the record beginning with the fifth question on 627 and ending with the answer to the sixth question on page 628.

* * *

[6733] The Court: All right. The granting of the defendants' motion to strike will exclude that portion of the Jacobs testimony subsequent to direct

commencing with the first question on page 801 of the stenographers' minutes, continuing to the answer to the first question on page 802, resuming with the first question on page 803 but omitting the answer thereto, and the second, third and fourth questions on page 803 and the answers thereto, resuming with the fifth question on page 803 and the answer thereto, omitting the sixth question on page 803 and continuing said [6734] omission down to the first question on page 804. Resuming with the first question on page 804 and continuing through pages 805, 806, 807 and to the answer to the fifth question on page 808.

* * *

[6775] The Court: After the rather protracted colloquy on this I am disposed to deny the Government's request that there be excepted from the defendants' motion to strike the Moran testimony contained on pages 1860 through 1862 of the stenographers' minutes. I realize, however, that in doing so in all fairness I should give the Government the opportunity anew to withdraw the objection that it successfully voiced to the defendants' motions to strike some of these minutes, and if the Government indicates a willingness to so move now we will then have to go back and examine each set of corporate minutes individually to determine whether they are in the same category as, for example, Defendant Klein's BS and BU.

Mr. Bauman: Well, I so move with relation to BS and BU and request the Court that we take each set of minutes presently in evidence.

The Court: All right, we have analyzed BS and we have analyzed BU. As to BS originally the defendants' motions to strike the minutes were denied. I now upon the Government having withdrawn its objection thereto grant the defendants' motions to strike BS and that exhibit is stricken.

With respect to BU the defendant Klein's motion to strike was denied, but on the basis of the Government [6776] now withdrawing its objection thereto that exhibit likewise is stricken.

* * *

[6777] The Court:

* * *

You are correct, Mr. Bauman, the next one would be CG.

Mr. Bauman: That your Honor will find at page 6263 of the minutes where the defendant Klein moved to strike.

The Court: I take it you are now withdrawing your opposition.

Mr. Bauman: Yes, sir.

The Court: Defendant's motion to strike CG are granted.

* * *

[6778] The Court: Defendant Klein moved to strike CP at page 6267 and the Government opposed the granting of that motion on the same page.

I take it the Government withdraws its opposition.

Mr. Bauman: Yes, sir.

The Court: All right. Then the defendants' motion is granted and CP is stricken.

The next would appear to be DA.

[6779] Mr. Bauman: DA is at page 6278, your Honor.

The Court: Yes. Mr. Kiendl made the same motion and the Government opposed it.

Mr. Bauman: We withdraw that opposition.

The Court: Klein's DA is stricken.

* * *

[6782] The Court: Therefore the defendant Klein's DF is now stricken.

DG is in the same category, is that correct?

Mr. Kiendl: Correct, your Honor.

The Court: The same thing, Mr. Bauman?

Mr. Bauman: Yes.

Mr. Bender: Except that it also has been admitted as to Haas.

The Court: Yes, you are right. Do you join [6783] in the motion to strike it?

Mr. Bender: I do, your Honor.

The Court: All right, then Defendant Klein's DG is stricken.

That brings us to DH which is in the same category as DG.

Mr. Bauman: The same motion.

The Court: Do the defendants move to strike that?

Mr. Bender: We do, your Honor.

Mr. Donohue: We do, your Honor.

The Court: The Government's position the same?

Mr. Bauman: Yes.

The Court: Granted.

And now we come to DI, which is in the same category as DG and DH and unless I hear from anyone to the contrary there will be the same disposition and Defendant Klein's DI is stricken.

DJ.

Mr. Bender: That is R-DJ.

* * *

[6784] Mr. Donohue: In order not to add to the confusion, if it pleases the Court, the defendant Alprin withdraws his request that the then defendant Roer's DJ be excepted from his motion to strike and now moves to strike it.

* * *

[6785] The Court: Yes, that's right. Page— at page 2209.

In any event, regardless of that all defendants are now moving to strike Roer's DJ and the Government voices no opposition.

* * *

Mr. Bauman: The Government voices no objection to it.

[6786] The Court: All right, then Defendant Roer's DJ is stricken on defendants' motions.

Mr. Kiendl:

* * *

We would like for the record now to move to strike out all the certificates of resolutions of minutes of the board of directors or of the stockholders of any of these companies opening bank accounts, and I have a list of them here which I don't think is all inclusive but will suffice:

Klein's Exhibits BM, BR, CD, CU, CR, CS, CX, CY, and that is all.

Mr. Bender: The defendant Haas will join in that motion and for the further reason that in view of what Mr. Bauman stated his purpose was in objecting to our motion to strike these, it would seem to be going beyond your Honor's intention with regard to the limitation of these exhibits as background and rather that he intends to use them specifically with regard to conspiracy and elements of the conspiracy charged in the fifth count.

The Court: Well, if you are relying on the colloquy or the statement by the Court which I read from the minutes today, and if there is any [6787] doubt about it I think what I said yesterday afternoon with respect to the Dennis case would seem to enlarge. I was wrong when I said that the only basis of background material would be practically history. And in order that you may be fully advised thereof and fully prepared to meet that situation I am telling you now that what I said yesterday I thought conveyed the notion that I had broadened my concept of the effect of background material. But I didn't want you to get the notion that I was reverting to my original position because in the course of

reading minutes today I read my original position. Do I make that clear?

Mr. Bender: You do.

The Court: All right.

Mr. Bender: I was speaking mostly of Mr. Bauman's statement today, your Honor.

The Court: Yes. Do you join in that motion?

Mr. Donohue: I join in that motion.

The Court: Do you consent to it?

Mr. Bauman: No, sir, I do not.

The Court: Well, then, the motion is denied.

* * *

[6793] The Court:

* * *

The next testimony would appear to be that of the Witness Hill on pages 3271 to 3291.

Mr. Kiendl: Defendant Klein moves to strike.

Mr. Bender: Defendant Haas moves to strike.

Mr. Donohue: I am trying to make certain if the exhibits which were put in evidence by the Government through the witness Hill was stricken.

Mr. Bauman: They were not.

The Court: Do you have the numbers?

Mr. Bauman: 254.

* * *

[6795] Mr. Donohue: Then may I say, if it please your Honor, in the light of the ruling by your Honor in retaining in evidence the exhibits which were identified through Mr. Hill, I do not move to strike his testimony.

The Court: Any comment by the Government?

Mr. Donohue: May I at this time renew my motion to strike the exhibit as well as the testimony on the ground that it is obvious that these exhibits have no reference whatsoever to the fifth count?

Mr. Bauman: Let me address myself to the first motion of Mr. Donohue, namely—I guess that was not a motion; he said he does not move to strike, and you asked whether I had any comment.

The Court: Yes.

[6796] Mr. Bauman: I have no application to make to strike that testimony.

The Court: All right.

Now do you have any comment regarding his second motion, his affirmative motion that 254 be now striken?

Mr. Bauman: Yes. I oppose that strongly.

The Court: All right. The motion to strike 254 is denied.

Now, Hill's testimony from page 3271 to page 3291, the motion of the defendants Klein and Haas to strike the same is granted and it is stricken as to them.

* * *

[6798] The Court: All right. That will be held in abeyance.

Then that brings us to the testimony of Mr. Kiven.

Mr. Kiendl: If your Honor please, before we come to that, may we go back to Mr. Armitage again?

The Court: Surely.

Mr. Kiendl: Because I seem to be getting sand in my eyes. According to my notes your Honor has stricken out the entire testimony of Armitage.

The Court: That was your motion.

Mr. Kiendl: That was my motion. But there is an exhibit that your Honor held in abeyance, 249, which refers to one of the Koerner interviews. That is not the interview that Mr. Armitage had but the one later on by the special agents of the Internal Revenue Bureau, October 15, 1952. And if it is appropriate and convenient for your Honor, we would like to move to [6799] strike out that exhibit now on the same ground that the Armitage testimony was as to the prior interview.

Mr. Bauman: I had consented to the one involving Armitage previously and based upon my stipulation that that was an admission. I had made no such stipulation with relation to the exhibit your Honor now has before you, and I would suggest, sir, that it be taken in its regular order, because I think if your Honor wishes to hear argument the Government will argue that that is a statement which should be considered under the fifth count in that it was made by the co-conspirator, the named co-conspirator Koerner, to the Internal Revenue Service for the purpose charged in the fifth count.

The Court: Well, that is one we have held in abeyance.

Mr. Kiendl: That is all right, your Honor. I thought maybe Mr. Bauman's position would be

consistent with what I thought his position was regarding Mr. Armitage.

The Court: So we will continue that——

Mr. Kiendl: I am sorry I brought it up.

The Court: —until we conclude the others.

* * *

[6802] The Court: Now then the counterpart by way of Kiven's testimony of what was in 267 is, as I have indicated, contained in the record pages 3511, I believe,— [6803] well, it is really 3512 where he identifies the exhibit—to, as I said, page 3625; and confining yourselves to that portion of Kiven's testimony, gentlemen, I am prepared now to hear whatever motions you are advised to make.

Mr. Kiendl: Our motion is to strike it out on the ground that on no possible theory can it be binding on the defendant Klein as the defendant Roer was not a co-conspirator nor a defendant named in the fifth count and it cannot be admitted as against Klein as an admission against interest, and it can only be admitted as against Roer under any theory and he is out of the case.

Mr. Bender: The defendant Haas joins in that motion and on the further ground that since the admission of any testimony of a co-conspirator or defendant as against any other is an exception to the usual hearsay rule since Roer is not a co-conspirator or a defendant the statement would be pure hearsay as to the defendant Haas.

Mr. Donohue: The defendant Alprin in moving to strike the testimony in the nature of the statement

of Albert Roer adopts the reasons as heretofore stated by Mr. Kiendl and Mr. Bender.

[6804] Mr. Bauman: Your Honor, the Government submits that as to the Roer statement it is a statement that was made by Roer in furtherance of the conspiracy named in the fifth count.

The Court: Well now, I am afraid I will have to interrupt you again, Mr. Bauman.

When was the Roer income tax return filed? 1950, wasn't it?

Mr. Bauman: Yes, sir.

The Court: And when was the Koerner and Alprin income tax returns filed? 1952?

Mr. Bauman: Right.

The Court: Were they actually filed in 1952 or in 1953?

Mr. Bauman: I beg your pardon. They were for the year 1952 and they were filed in 1953. And Roer's was filed in 1951.

The Court: 1951. So that if the terminus date was the filing of the last of these returns then Roer's statement in 1952 would have been made within that period of time.

Mr. Bauman: Yes, sir.

The Court: Thank you. I just wanted to clear that up in my own mind.

[6805] Mr. Bauman: Now as to the admissibility I respectfully suggest that if Roer had been named as a conspirator or defendant in the fifth count, out of the nature of the charge the statement would have been receivable as an act in furtherance

of the conspiracy. And it seems to me that the question before the Court is this and only this: Must every co-conspirator be named in an indictment before acts taken by him in furtherance of the conspiracy may be so received?

In other words, here you have a situation where Roer is not so named,--not so specifically named, and yet the filing of his 1950 income tax return is specifically set forth.

Under those circumstances cannot the jury find that in doing what he did, in filing his return as he did, in making this statement to the Internal Revenue people when they were looking into this matter, that he was part of a conspiracy to defraud the Government? And I respectfully suggest, sir, and I think I can get the cases for you fairly quickly, that not every conspirator must be named in the count in order to have his acts binding upon the members of the conspiracy. In other words, supposing a hypothetical situation where the four of us sitting at my table are actually involved [6806] in a conspiracy but the indictment only charges three of us, and in fact makes no mention of the fourth person at all. Supposing the proof is such that the Court determines that a jury may find that a conspiracy existed as to the four of us including the one not named as a conspirator or a defendant in that count, must the the Court then instruct the jury that if they so find the acts of the individuals not named specifically as either a conspirator or a defendant in the indictment that nonetheless if he in fact was a conspirator, binding on those so named in the indictment?

That is the question and the only question I think with relation to Roer.

Now I have said, and I urge upon the Court that the law is——

The Court: Let me interrupt and ask you this question: Assuming that is the law—assuming that—that despite the fact that Roer is named either as a defendant or a co-conspirator in the fifth count, that statements made by him, if the jury finds a conspiracy to have existed and that he was part of it, may be received as against all, doesn't it necessarily follow that the statement in toto may be received? In other words, there may be, just in the [6807] case of any other oral testimony, only portions of it.

For example, Roer's testimony before Armitage, or statement before Armitage with respect to the two hundred and seventy odd thousand dollar check.

Mr. Bauman: Koerner's, rather.

The Court: No, I am talking about Roer's statement. Did his statement have any reference to——

Mr. Bauman: To Victory.

The Court: What did I say?

Mr. Bauman: To Armitage.

The Court: I beg your pardon. I meant Victory.

Now I take it that the Government's position is that what was done with respect to these three checks was part of the attempt to throw sand in the Government's eyes.

Mr. Bauman: Yes, sir, that is correct.

The Court: Now, then, I say, assuming that this statement could be received, does it necessarily follow that it has to be taken as to everything or may it be received only as to those things that may be relevant to the fifth count? And I will give you until 2:15 to think it over. (Laughter). And have some lunch in the meantime.

(Recess to 2:15 p. m.)

[6808] AFTERNOON SESSION—2:15 p. m.

Mr. Kiendl: Your Honor, here are three copies of those requests to charge.

The Court: Oh, thank you.

Now the reading of the Roer statement-from Kiven's notes begins at page 3557 I believe and concludes at 3625, and if my memory serves me correctly we were at the point of considering motions to strike that entire statement when the Government asked for time to make specific objections thereto.

Mr. Bauman: No, sir, your Honor——

The Court: And I proposed the question following that, that assuming that Roer were to be considered as a conspirator, despite the fact that he was mentioned neither as a co-conspirator nor as a defendant in the fifth count, would that in and of itself entitle the reception of the entire statement or merely those portions of the statement that might have some bearing on the fifth count. I think it was on that point that we suspended.

Mr. Bauman: Yes. I shall answer your question directly, but I wanted to indicate to the Court what is in my mind, that I do say, and that is, [6809] that

at first blush it occurred to me that it would be an easy thing to say only those facets contained in the fifth count, but I thought that the example your Honor put some time ago with relation to the house that you and your brother owned, and your Honor remembers that example that you gave some time, where in fact although no taxes owed a conspiracy could exist with relation to trying to impede the Government in the collection of its revenues.

And so having that in mind I say, in answer to your Honor's question, that that part of Roer's statement which goes to the fifth count in that sense is the limit of the admissibility of the statement except in so far as some portions—well, that wouldn't come up in the Roer case; I am limiting myself now to the case of the individual Roer. Now, that will be the limit, as I understand it, in his case, with the exception of any statement, preliminary statement that he might have made with relation to the origin of his connection with the defendant Klein, which I think is by way, really, of introducing the later statement which the Government claims is in furtherance of the conspiracy in the fifth count.

[6810] To answer your Honor's question directly I say that having in mind the example your Honor gave, the admission of that Roer statement would be limited to its application to the fifth count.

The Court: Well, doesn't that beg the question?

Mr. Bauman: I hope not.

The Court: Without specifically giving me the portions then you place it upon me to go through

the statement and determine which have relationship to the fifth count and which not. But even before we come to that——

Mr. Bauman: Well, I would be happy, if the Court wants, over the weekend to do that.

The Court: Well, that is what I understood you wanted to do in the recess, was run through the statement and select the portions that you thought addressed themselves to the fifth count, assuming—and then, again, that calls upon you for the production of the cases that you said you had that would indicate beyond doubt that notwithstanding that Roer was not named as a co-conspirator that his connection with the fifth count occurs only in connection with the statement that it was part [6811] of the conspiracy that he filed a return, that nevertheless, statements made by him would be admissible under the fifth count. Then of course the corollary to that would be what portions of his statement address themselves to the fifth count. Now if you are not prepared to do that we can pass it over and go to something else until you have had an opportunity to supply what I consider those two elemental links.

Mr. Bauman: I would appreciate that. I am not prepared to proceed as to the Roer statement at this point.

The Court: All right. We also have to defer consideration of Kiven's cross, because I believe that that was all addressed to his reading of the

statement, and that concluded at page 3650. And that brings us now to the testimony of Lawrence Gordon Baker.

* * * *

[6818] Mr. Kiendl: If your Honor please, if we read the digest of Mr. Baker's testimony, he testified to two conversations with Mr. Koerner, one in July of 1951 and one in December of 1951, as to one conversation [6819] with Roer March 10, 1952. And the defendant Klein moves to strike out——

The Court: Now just a moment. Didn't he also testify that he had a conversaiton with Roer about March the 13th of 1952, about three days after that first one?

(After a pause) Unless I misspeak myself, in my notes it would appear to me that on page 3657—now I am reading from my notes now of my analysis. I may be wrong. Let us look at it.

Mr. Kiendl: I think your Honor is probably right. My notes at the end here indicate that there was a conversation two or three days after.

The Court: Yes.

"Q. Did you within two or three days after March 10th have another conversation with Mr. Roer? A. I did.

"Q. Do you remember what that conversation was in part?"

et cetera.

Well, apparently he did have another conversation and then he also testified about an endorsement on the back of Government's Exhibit 269. That was the substance of his entire testimony.

[6820] Mr. Kiendl: Then as to those conversations and that testimony, if your Honor pleases, the defendant Klein moves to strike it all out on the ground that it is pure hearsay as to him and in no sense binding on him in connection with the issues now raised under the fifth count of the indictment.

Mr. Bender: The defendant Haas makes the same motion, your Honor.

Mr. Donohue: The defendant Alprin joins in the motion and adopts Mr. Kiendl's reasons.

Mr. Bauman: The Government opposes those motions, sir.

The Court: The motions are denied.

* * *

Mr. Bender: I take it that this witness Baker, your Honor, his testimony is not admissible, or at least is not binding on the defendant Haas.

The Court: It is binding to the extent that the jury may find it is binding after they find [6821] a conspiracy.

Mr. Bender: Yes, that is correct.

* * *

[6823] The Court: I see. All right then, addressing ourselves to Holahan's testimony which begins at page 4087, now on direct I have selected on two general categories which were excluded as to Haas and Alprin and they are Holahan's conversation with H. H. Klein at New York branch of the Royal Bank of [6824] Canada in September, 1944, and Holahan's telephone conversation with Klein in the early part of 1946 when Holahan called Klein in Baltimore. And then Holahan—well, in cross-examination dealing with the same conversations.

Now that Holahan conversation, the one in September of 1946 I believe is the crucial conversation from the Government's point of view.

(Mr. Bauman nods.)

The Court: And that brings to mind, gentlemen—I made merely a mental note of it—that in some of the documents by way of briefs and the like submitted by the Government, the Government characterized the subpoena which Holahan testified having received and brought up to—Root, Ballantine, I believe it was?

Mr. Bauman: Yes.

Mr. Kiendl: Yes.

The Court: Who were attorneys not only for the bank but also for Mr. Klein at that time for an opinion on what they should do with respect to that subpoena. The Government has characterized that subpoena in a way that would make it appear that

it was a subpoena by a Federal governmental agency to produce records. Now I don't know whether that—[6825] of course I don't know which one of the legion of Government assistants wrote that particular portion of the brief, but I have a very vivid recollection that I said to myself, although I didn't take the trouble to review the testimony, I said to myself that my recollection of Mr. Holahan's testimony was that he merely said that they got some sort of an order to produce papers but where the characterization that it emanated from a governmental agency came from, and that becomes very important, and if it did I would like to have the testimony pointed out to me where he said that that subpoena emanated from Internal Revenue or any other governmental agency. For all I know it might have been a subpoena in a civil suit.

(After reading) Yes, this is the section that I am referring to, gentlemen, and it may be that I misconstrued your language, but I don't think so. I will read it to you in a moment.

On page 157 of the Government's brief in opposition to the motions for judgment of acquittal the first paragraph on that page reads as follows:

> "Over $8,000,000 in securities were transferred from New York to Canada in September, 1946 at Klein's direction when he was informed"——

and I am assuming that that is the Holahan testi-

mony, [6826] unless you show me elsewhere in the record——

"when he was informed that government agents wanted to inspect his bank accounts."

And that to me is a very important factor because I don't recall anything in Holahan's testimony that government agents wanted to inspect his bank accounts. All I recall is that somebody served him—he didn't recall whether it was a subpoena or an order or some document—to produce certain records. And I want to know the basis for the statement that the $8,000,000 was transferred when Klein was informed that the Government agents wanted to inspect his bank accounts.

I don't think there is any basis for that statement in the brief at all. But I ask it because I may be mistaken.

Mr. Kiendl: We have the page references if your Honor desires them.

The Court: Page references that show that Government agents served——

Mr. Kiendl: Page references that show that Government agents did not—that he did not testify to that.

The Court: Oh, I know that. I think I have generally summarized what he said: that merely somebody [6827] wanted to look at bank records, period.

Mr. Kiendl: That is correct.

The Court: But there has been injected into that a characterization that I think becomes very

important. I would like to have it cleared up for my own understanding of the facts.

You see, that conclusion would appear to be entirely unfounded when you look at Holahan's statement at page 4095:

> "I told Mr. Klein that we had received a document or a paper calling for the production of records of a company or companies, I don't recall which, accounts which were in our bank and where Mr. Klein was the signatory, to produce this paper either before some court or somebody. And I must confine myself to Mr. Klein's answers——
>
> "Q. That is correct. What did you say to Mr. Klein and what did he say to you? A. Very well. Mr. Klein told me—I don't know his language, but, in any event, he didn't want us to produce the records. I don't know whether it was an order to produce records or a request to produce records.
>
> "Q. What did Mr. Klein say to you about that? [6828] A. He said that he didn't wish to have the records produced.
>
> "Q. What else did he say? A. He said that he wanted to have certain bonds, Dominion of Canada bonds that we have in safekeeping for a company or companies sent to Montreal to be held in safekeeping for the same entities.
>
> "Q. And that was in the same conversation that you are just telling us, is that correct? A. Yes."

et cetera, et cetera.

Mr. Kiendl: On cross-examination at page 4114 you will find that confirmed, your Honor, specifically. He doesn't know what this request was.

The Court: Yes.

Now my purpose in bringing that up is, regardless of the admissibility of Klein's instructions about the transfer of funds in its rather vague character, I don't think that the mere fact that somebody served some sort of a paper to produce some records is admissible. I mean I am not isolating that. We will receive the appropriate motions. But I want to explain why I picked that out. Of course had the testimony been as the Government said in its brief it was, and I am [6829] persuaded that it was not that—had it been a demand by a Governmental agency, that might be admissible in connection with what the Government has chosen to call the flight of the funds. Instead of being Rimsky-Korsakoff's "Flight of the Bumble-Bee" it is to the Government the flight of the funds. But in its present posture, merely somebody demanding the production of something somewhere I don't think it is admissible under the fifth count.

Now of course I am not expressing any opinion on whether his subsequent instructions to transfer funds is admissible. We will come to that.

Now have the defendants put their motions on the record with respect to the Holahan testimony? Mr. Bauman had suggested, I believe, or we were at a point where Mr. Bauman had suggested I be-

lieve——or was that in connection with Baker that they do it in specific categories?

Mr. Bauman: It is in connection with all of these witnesses.

The Court: Oh. And Mr. Kiendl had read his summary and then I read mine and that is where I injected this question of that subpoena.

[6830] Mr. Kiendl: If your Honor please, we move to strike out the conversation in September 1944 as not background evidence and not admissible under any theory. That runs from page 4087 to approximately 4093, when this other conversation started. Yes, through 4093.

The Court: I think the Government is entitled to have the answer to the—or, rather, I should say the second question on page 4091 and the answer thereto, and I won't strike that. In order to make it intelligible I would allow the second question and answer thereto on page 4089. In other words, "Do you remember seeing the defendant Hyman Harvey Klein during the year 1944?"

"Yes, I do."

The sixth question on page 4089 and then commencing with what would appear to be the answer to the second question on page 4090. It is really an answer to the sixth question on page 4089 because of an intervening objection, down to the bottom of page 4091.

Now I do not think I gave the defendants Haas and Alprin an opportunity to place their motion on the record.

Mr. Bender: Well, the defendant Haas will [6831] move to strike that portion of the testimony of Mr. Holahon referred to by Mr. Kiendl, on the ground that no part of it is material or relevant either as background or as in any other form to the issues in the fifth count.

Mr. Donohue: The defendant Alprin joins in the motion for the same reason, your Honor.

The Court: The same ruling as that made in the case of the motion of the defendant Klein.

Mr. Bauman: The Government moves the admissibility of background testimony against the defendants Haas and Alprin.

The Court: The motion is granted.

Now your motion took us up to page 4093, did it not?

Mr. Kiendl: If your Honor please, before we pass that, may we call your Honor's attention to the fact that it is our submission that that testimony which your Honor has now left in the record so far as Mr. Holahon is concerned is testimony of the same general character that you struck out in the case of Mr. Jacobs. We do not see how it has any possible bearing on the conspiracy alleged in the fifth count, and we do submit that the matter has [6832] been adjudicated in connection with the motion for judgment of acquittal as to Counts 1, 2, 3 and 4.

The Court: Well, maybe I was wrong in striking it out as to Jacobs.

Mr. Kiendl: Of course, your Honor may be wrong in striking it out as to Mr. Holahan.

The Court: I know, that is the point that you make: I know I shouldn't vacillate on this because, frankly, it is a very, very difficult thing to draw a line, but I have no doubt, at least since my statement yesterday afternoon in my analysis of Dennis, that that is properly in as background material, tax consciousness. For whatever value it has as to its weight, you may be able very adequately to explain to the jury that no inference can be drawn from the fact that he said to Holahan that there is a tax benefit to be gained, by the very same token; and I say now maybe I was wrong in striking out that testimony with respect to Jacobs. And I assume that you are alluding to the conversations where there was a characterization I believe by Alprin over the telephone that it was a tax situation or at the conference that it was a tax situation that induced the Agencias name appearing in the contract. [6833] That is what you are referring to.

Mr. Kiendl: That is it, and the tax maneuver situation.

And can an inference be drawn of wrongdoing from a mere statement about tax consciousness?

The Court: Well, I think you are handing me a loaded question.

Mr. Kiendl: I don't mean to, your Honor.

The Court: The obvious answer is that an inference of wrongdoing cannot be drawn from a mere statement that I am doing a certain thing in order

to gain a tax benefit, because under our self-assessment system of taxation we all are entitled and expected to do whatever is legally right to gain a tax benefit and avoidance. That is not the question. The question is, that coupled with a number of other things whether the jury may fairly infer therefrom that there was a conspiracy to conceal the true picture from the Government. And I say to that extent it is entitled to go in as background material.

Mr. Kiendl: I don't want to labor the point. I just wanted to call it to your Honor's attention.

The Court: Yes, and I am not going to [6834] retrace my steps and reappraise Jacobs. Having done it there and it has been to the defendants' benefit, that is the way it will have to remain. It may on the face of it appear to present an inconsistency, and without thinking it over and analyzing it more carefully and referring again to the minutes, I wouldn't want to express an opinion on it one way or the other. But it would seem to me that when he came to the bank and opened the account for Agencias and told Holahan, when he asked why the Spanish company or the Cuban company and he says, "It is for a tax advantage,""tax benefit," whatever the term was, it was certainly a far more innocuous word than the one that was attributed by Jacobs to Mr. Alprin, i. e., maneuver.

Mr. Kiendl: Maneuver sounds bad.

The Court: Yes. In the minds of laymen and in the minds of a lay jury it may have certain im-

plications of tax benefit. I don't know. I know it would to me.

But, in any event, I think it ought to remain in, and to the extent that the motion is addressed to strike it out the motion is denied, and that goes for all three, and the Government's motion to receive it, [2835] as against the defendants Haas and Alprin is granted.

What page did you go to, Mr. Kiendl?

Mr. Kiendl: 4093.

The Court: 4093. And I take it that starting with the top of 4093—well, in order to have complete continuity, in view of the fact that I admitted up to the bottom of 4091, that portion, will you give me—your motion is addressed to the testimony of Holahan starting with 4092.

Mr. Kiendl: I don't quite understand, your Honor.

The Court: Well, you will recall that the exception and the motion to strike that I just granted——

Mr. Kiendl: Yes.

The Court: Came down to the point at the last answer on 4091. Therefore I would suggest that in order that we have no hiatus that you address your next motion to the testimony commencing at the top of 4092.

Mr. Kiendl: Then we move to strike out the testimony on page 4092 and down to the last question on page 4093.

[6836] Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin joins in the motion, your Honor.

Mr. Bauman: The Government opposes that motion, sir.

The Court: Motions granted.

Mr. Kiendl: Then, if your Honor please, the defendant Klein moves to strike out from the testimony of Mr. Holahan beginning at page 4094 that part of the conversation that he narrated which relates to the service upon him or the receipt by him of some document calling for the production of some papers. I can't give your Honor the exact page reference; I can only give you the subject.

The Court: Yes, I realize that.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

The Court: Well, on the assumption that that testimony dealing with the service of that document, whatever it was, on the assumption that that would be deemed to have concluded with the answer to the first question on page 4096, I will make this ruling:

[6837] That the defendants' motions to strike the testimony on page 4094, 4095 and through the answer to the first question on page 4096 are granted, except that the third, fourth, fifth, sixth, and seventh questions and the answers thereto on page 4094 are excepted from the granting of the motion to strike. They merely indicate that there was a telephone conversation——

Mr. Bauman: May I have that read, please?

(Record read.)

The Court: Now, then, that brings us down to whatever motion the defendants are advised to make with respect to the testimony commencing with the second question on 4096.

Mr. Kiendl: The defendant Klein moves to strike out the entire testimony of the witness on the subject of the transfer of the safekeeping of the Canadian bonds and securities, on the ground that it does not come within the purview of the issue raised by the fifth count of the indictment and relates to the so-called flight of capital, if your Honor please.

Mr. Bender: Defendant Haas makes the same motion.

[6838] Mr. Donohue: The defendant Alprin joins in the motion.

Mr. Bender: And I would like to add further, your Honor, that, at best, the alleged flight of capital does not have any relation to the individual income which the Government seeks to charge in the fifth count but rather refers to corporate capital.

Mr. Bauman: The Government opposes the granting of those motions, your Honor.

The Court: First we will have to determine—we have determined the beginning point of that testimony and we will have to determine the end of it before we can rule upon it.

Mr. Kiendl: I think it begins on page 4096.

The Court: Yes, it begins with the second question on page 4096.

Mr. Kiendl: Right. I think it goes down at least to page 4101.

The Court: Yes.

Mr. Kiendl: Through the second question and answer.

The Court: Yes.

[6839] Would you read back the last that you have on your minutes, please?

(Record read.)

The Court: The defendants' motions to strike the testimony commencing with the second question on page 4096 and terminating with the answer to the second question on page 4101 is denied, except that there will be deleted from the answer to the third question on page 4096 after the comma in the second sentence of that answer the words, "and then I confirmed that as far as the—in producing records, that is a matter that the bank's attorneys would have to dwell on,".

Now this original testimony was received only as to Klein.

Mr. Bauman: No, sir, this is part of the——

The Court: The period subsequent to June 1st, 1946.

Mr. Bauman: May I make a suggestion, sir?

The Court: Yes.

Mr. Bauman: Because with relation to page 4096 may I suggest, if it does not do any violence to the meaning of the answer, your Honor has

stricken [6840] from that answer, "and then I confirmed that as far as the," a number of words thereafter——

The Court: Yes. Now it reads—the question is, "And that was in the same conversation that you are just telling us, is that correct?"

Now you must read it in this context, Mr. Bauman. Here is how it finalizes itself. You have to go back to 4094, and that is the reason why I allowed that in to make sense of it. So that it reads in continuity this way:

"Do you remember having a conversation with the defendant Hyman Klein during 1946? A. Yes, I do.

"Q. During the month of September? A. Yes, in September.

"Q. Can you tell me, please, when to the best of your recollection that conversation took place? A. I think in the first half of the month, although I am not sure.

"Q. Now did that conversation take place in person? A. No, sir.

"Q. How did it take place? A. By telephone."

[6841] A few dots:

"Q. What else did he say? A. He said that he wanted to have certain bonds, Dominion of Canada bonds that we have in safekeeping for a company or companies sent to Montreal to be held in safekeeping for the same entities.

"Q. And that was in the same conversation that you are just telling us, is that correct? A.

Yes. There was a lapse in the conversation because I wish to speak to someone, but as far as the shipment of the bonds we would get them out just as soon as we could."

And then you go on without any deletions until the end of the testimony which is with the answer to the second question on page 4101.

Mr. Bauman: Thank you very much, sir.

The Court: We will take a recess, gentlemen.

Mr. Bender: Off the record.

(Discussion off the record.)

(Short recess.)

The Court: Now, Mr. Bender, you were suggesting something.

[6842] Mr. Bender: I was thinking that the word "else"——

The Court: That in the second question on page 4096 we omit the word "else."

Mr. Bender: I merely say that the jury should not think that there was another conversation which was stricken or missing.

The Court: Yes. All right, the word "else" will be omitted.

Now, then, that brings us to the Holahan testimony commencing with the third question on page 4101.

Mr. Kiendl: We move to strike out from thereon to the end of the direct examination on page 4103, on the ground that it is not proper background material and not pertaining to any issues in the fifth count.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

The Court: Motions granted.

Now that brings us to the cross-examination by Mr. Kiendl on page 4103.

Mr. Kiendl: If your Honor please, the defendant [6843] Klein moves to strike from the cross-examination of the witness Holahan that portion beginning at page 4114 beginning with the second question on that page down through the first line on the top of page 4117, that in connection with the part that has been stricken out on his direct examination regarding production of documents.

The Court: Now am I to understand that you exclude from your motion to strike the cross-examination of Holahan commencing with 4103 down to the third question on page 4114?

Mr. Kiendl: The second question on page 4114.

The Court: The second question, yes.

Mr. Kiendl: That is right, your Honor.

The Court: And you are moving to strike from the second question on page 4114 to the end of the first line on page 4117.

Mr. Kiendl: Quite correct.

The Court: Do the other defendants join in that motion?

Mr. Donohue: Yes, your Honor.

Mr. Bender: Yes, your Honor.

Mr. Bauman: I was looking at 4113 and I [6844] ask your Honor to consider that page in the

light of the direct that was retained as background.

The Court: Well, you ask me to consider it for what purpose?

Mr. Bauman: I would like to move to strike page 4113 from the record.

The Court: Denied.

Now, then, the defendants' motions to strike the Holahan cross commencing with the second question on 4114 and ending with the four words on the top line of 4117 are granted.

[6845] Mr. Kiendl: If your Honor please, the defendant Klein now moves to strike out from the cross-examination of the witness Holahan that portion beginning on page 4118 with the third question on that page and continuing through the rest of his cross-examination.

We also move to strike out the redirect examination by Mr. Bauman and the recross examination by me of that same witness in its entirety.

The Court: That will be to page 4153, right?

Mr. Kiendl: Right, your Honor.

Mr. Bender: The same motion by the defendant Haas.

Mr. Donohue: The defendant Alprin joins in the motion to strike, your Honor.

The Court: Now I take it that there is excepted from the motion to strike commencing with the first question on page 4117 and terminating with the answer to the second question on 4118.

Mr. Kiendl: That's correct, your Honor.

The Court: Now wouldn't it be wise, pending a determination of that, to incorporate in the same application, however, some revision of the [6846] first question on 4117 because it now reads:

> "Now you say in the same telephone conversation with Mr. Klein regarding those records that he told you (about) after some interval that he wanted you to send certain bonds to Montreal for safekeeping?"

I would suggest that we omit from the question the word "same" on the first line of the question so that it reads:

> "Now you say in the telephone conversation with Mr. Klein"——

omitting the words "regarding those records that he told you after some interval that he"—omitting up to and including the word "interval."

So that the sentence would read:

> "Now you say in the telephone conversation with Mr. Klein that he wanted you to send certain bonds to Montreal for safekeeping?"

Is that agreeable?

Mr. Kiendl: Entirely agreeable, your Honor.

Mr. Bender: Yes, your Honor.

Mr. Donohue: Yes, your Honor.

The Court: The motion is granted and the [6847] words as just indicated are omitted from the first question on page 4117 and the defendants' motions to strike the balance of the Holahan tes-

timony commencing with the third question on page 4118 and terminating at 4153 are granted.

And that would appear to dispose of the Holahan testimony and that brings us down to Mr. Brewster, whose testimony commenced at page 4154 and terminated at 4189.

Mr. Kiendl: The defendant Klein moves to strike out that entire testimony on the ground that it is not germane to any issue under the fifth count and concerns itself with a conversation that the witness had with Mr. Klein regarding some OPA investigation.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: The defendant Alprin joins in the motion to strike, your Honor.

Mr. Bauman: The Government opposes those motions, sir.

The Court: Granted.

Mr. Bauman: May I say with relation to the witness Brewster that I think it is of considerable seriousness and relating to the fifth count when your [6848] Honor remembers that three of the drafts, as I remember them, were issued in March of 1947, and that some time before that, in 1946, in the fall of 1946, a representative of the Government, whether he be OPA or some other kind——

The Court: Well, I am not prepared to slough that off as easily as that.

Mr. Bauman: May I just continue for one minute, sir?

The Court: May I suggest and probably save you—you appear to be a little bit tired: I guess we all are; and I want to save you unnecessary labor—may I suggest that if a cop walked in and said, "I am going to give you a summons for spitting on the sidewalk" it would have just about as much connection as this man Brewster who admitted that he wasn't there for an OPA purpose and as a matter of fact he was there as a dummy. He was supposed to audit books that were never produced.

And somebody else, Lowenbahr or somebody like that——

Mr. Bauman: Lobenthal.

[6849] The Court: Lobenthal, he did the interrogating, and that was very perfunctory.

I fail to recognize where that has any rational probative value to the fifth count. The fact that the Government decides to send somebody in to investigate, somebody from the OPA.

Mr. Bauman: Well, somebody from the OPA said to Mr. Klein, "Where do you file your income tax returns?"

Mr. Kiendl: He said, "None of your business."

Mr. Bauman: And Mr. Klein said as Mr. Kiendl points out behind me, "None of your business."

Mr. Kiendl: I am sorry, Mr. Bauman.

The Court: Good for him. I agree with him.

[6850] Mr. Kiendl: That is what I would have said.

The Court: That is exactly what I would have said if the man said, "I am from the O. P. A."

Mr. Bauman: Maybe I would have said it, but I think that at that time I would have known that the Government was interested in my income taxes.

The Court: So what? The Government is interested in everybody's income taxes. When mine gets down there some auditor makes a desk audit on it. They are always interested in every return that is filed.

Mr. Bauman: And I say, sir, that that might have some beafing on what I later do with three drafts, two for $264,000, and one for $272,000 within a period of five months after this representative of the O. P. A. asked Mr. Klein, "Where do you file your income tax returns?" And Mr. Klein told him none of his business.

The Court: Well, I say, supposing Mr. Klein had to expectorate on his way into the building and a cop chased him upstairs and when he got upstairs the cop said, "I am a cop, I am a local cop. Where do you file your income tax returns?" And Klein turned to him and said, "It is none of your business." Do you think that under those circumstances he should immediately conjure up in his mind, "Aha, the Government is after me on income tax"?

[6851] Mr. Bauman: No.

The Court: Well, I think that that is so remote and so ridiculous, Mr. Bauman, if you permit me

to say so, that I just can't see any probity, I can't see any connection between it. Oh, it is nice window dressing to talk about before a jury, but that's all it is.

Mr. Bauman: I respectfully disagree with your Honor's conclusion as to that.

The Court: Well, I know you wouldn't urge it if you didn't sincerely disagree with me, and I disagree with you in equal candor. I just can't follow you on it and I am going to adhere to my ruling and strike out the entire testimony of the witness Brewster.

Mr. Bauman: Well, I should just like to address one last remark.

The Court: That is all right, I will still remain open on it but it will have to be a doozy (laughter).

Mr. Bauman: And that is there is a substantial difference between a policeman who is interested in Mr. Klein's habits of the kind you described if he is possessed of them——

The Court: Don't be so finicky about it. [6852] I said, "Spit on the sidewalk." (Laughter).

Mr. Bauman: I suggest there is a substantial difference between a cop who is after Mr. Klein for spitting on the sidewalk asking him where he files his income tax returns and a representative of the Federal Government engaged upon an investigation of Mr. Klein's business activities with relation to the whiskey he was engaged in selling for the two preceding years when I think your Honor will agree by virtue of what I would think a court would take

judicial notice of, and that is that O. P. A. and income tax at the time of the enforcement of these laws followed one another as the night the day.

The Court: I will absolutely, categorically and specifically refuse to take judicial notice of any such thing, and I would hate to think that our Government was involved on such a Hitlerian tactic that income tax investigation followed O. P. A. investigation as night did day. I would be a very sorry individual if I were not only to take judicial notice of it but to take notice of it as an American. I am speechless. I just can't conceive of any such philosophy.

Mr. Bauman: Well, the philosophy I advance in view of your Honor——

[6853] The Court: Maybe that is the losing-sight-of-the-forest-because-of-the-trees philosophy that may come—and I say this with the utmost deference—to people who are perpetually engaged in prosecuting Government cases. I don't mean to be rude. I hope you understand that. But it may be a philosophy that springs up in mind because of the fact that in the orbit in which the United States Attorney is interested in these matters because of his official duties he may find a pattern of one following the other. But to suggest to me that that pattern spreads far and wide over this land would certainly bring to my mind a very, very dark condition, one that I won't accept as an individual, I won't accept as an American, and I certainly won't accept and judicially know as a judge, because I can't believe it.

Mr. Bauman: On the record here, sir, I am suggesting that Mr. Klein could easily have come to that conclusion under the facts in this case.

The Court: He could have. Certainly he could have. He could have come to the conclusion too when the cop came upstairs that the Government was after him on income tax.

Mr. Bauman: Then it would be a matter for the jury to determine how much weight to give it.

[6854] The Court: No. No. I say, "He could have." And I am in the realm of the highest of possibilities, not even probabilities. But I fail to recognize any distinction between my hypothetical cop and your O. P. A. gentleman. I absolutely see no connection whatsoever between an investigation of the Office of Price Administration and the fact that you expect a man to gather from that that the United States Government was investigating his income tax status.

Mr. Bauman: Only when that man, sir, specifically asks him where his income tax returns are filed.

The Court: Well, that man had no right to ask him where his income tax returns were filed.

And I will tell you this much: that if he came up to my office and asked me I would tell him to mind his own business. It is none of his business where my return is filed. He works for the O. P. A. He has no more right to ask me that question and expect an answer, and no one has the right for me to suspect that I am being investigated, if he does ask the question, than if any other law enforcement agent

not connected with the collection of revenue should come and ask me where my returns are filed. I can't find any connection between them and I will adhere to my ruling [6855] to strike the Brewster testimony.

* * *

July 11, 1955, 11:30 A. M.

[6858] However, there was a series of stipulations between the Ruck testimony, [6859] the end of the Ruck testimony and the beginning of the Burke testimony. Now, I don't know if I have summarized them all. However, I have them this way:

At 4365 a stipulation that Government's Exhibits 16-A, 27 and 174, were typed on the same typewriter.

At 4367 a stipulation that Government's 16-C and 15-E were typed on the same typewriter in the office of H. Harvey & Company, Limited, Baltimore, Maryland.

At 4369 a stipulation by Klein that Government's Exhibits 13-G and 15-A were both typed on the same typewriter in his office.

At 4372 a stipulation by Klein and Koerner that Government's Exhibits 30-A, B, C, and D, 184, 108, as received in limited form, were typed on the same typewriter in the office of one of the companies in Baltimore.

At 4380 a stipulation by defendants Alprin and Koerner that Government's Exhibits 116, 117-B, 117-C, 121, 118-B, 119-B, 120 and 179, were all

typed on the typewriter in Mr. Alprin's office in New York City.

At 4392 a stipulation by defendant Klein that [6800] Government's Exhibit 13-A, B, C, D, E, F, G, H, I, J and K, Government's 153, Government's 156 and 18, and Defendant Klein's J, were all typed on the same typewriter in the office of one of the companies in Baltimore.

Now, those stipulations I think were in lieu of testimony by the witness Miller, if I remember correctly.

Mr. Kiendl: That is right.

* * *

[6861] Mr. Kiendl: Is that the stipulation regarding A, B, C——

The Court: No, that is the stipulation about 16-A, 27, and 1074.

Mr. Kiendl: If your Honor please, the defendant Klein moves to strike out that stipulation on the ground that it is not germane to any of the issues under the fifth count and two of the exhibits so stipulated, to wit, Government's Exhibit 27 and 174 have already been stricken from the record.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin moves to strike out the stipulation, conceding however that there are some of the documents which were the subject matter of the stipulation and still remaining, others having been stricken, your Honor.

The Court: Are you addressing yourself only to those three, 16-A, 27 and 174, the stipulation appearing on page 4365?

Mr. Donohue: Yes.

The Court: Or are you addressing yourself [6862] to the whole batch?

Mr. Donohue: I am sorry, your Honor. I was addressing myself to the entire batch.

The Court: That is what I thought. I think we had better take them up as they were stipulated as having come from particular typewriters.

Mr. Donohue: Right.

Mr. Bauman: I would like to be heard on that, your Honor.

The Court: Yes.

Mr. Bauman: The Government objects to the granting of that motion in so far as it applies to 16-A which remains in evidence and does not oppose as regards the other exhibits which are no longer in evidence.

The Court: 16-A was one of the allocation sheets, wasn't it?

Mr. Bauman: Yes.

The Court: And you have already got in the testimony or in the evidence, as I recall it, that those were prepared by Klein.

Mr. Bauman: Actually, your Honor, my recollection as to whether that still remains in the record is not very good and I would not want to say that that is a fact, and I would suggest to the Court [6863] that permitting the stipulation to remain on the record in so far as that one exhibit is concerned could work no great hardship or prejudice to the defendant.

The Court: If you will look at page 4367, Mr. Bauman, the last paragraph of my statement that gives the extent of the stipulation,

> "And the stipulation as I understand it is that all three documents, these three documents which I have exhibited"——

excuse me. This is your statement, not mine. Your statement commenced on page 4366, and you ended up by saying:

> "And the stipulation as I understand it is that all three documents, these three documents which I have exhibited, were typed on the same typewriter."

Mr. Bauman: That is correct.

The Court: So that would not accomplish your purpose in any event.

Mr. Bauman: I think that is correct.

The Court: The motion to strike out the stipulation as to Government's 16-A, 27 and 174 is granted.

By my notes the next stipulation would be that [6864] appearing at page 4367 dealing with Government's 16-C and 15-E, and there you stated, page 4368,

> "Mr. Kiendl has stipulated not only were they typed on the same typewriter, but, as I understand it, in the office of H. Harvey & Company in Baltimore, Maryland."

Now, what happened to those two exhibits?

Mr. Bauman: 16-C and 15-E remain in the record, you Honor, according to my notes.

Mr. Kiendl: This is the same as 16-A.

Defendant Klein moves to strike the stipulation as not germane to any issue under the fifth count.

Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin joins the motion.

Mr. Bauman: The Government opposes, sir.

The Court: The motion to strike is denied.

The next stipulation is that appearing, according to my notes, at page 4369 and deals with Government's 13-G and 15-A.

Mr. Kiendl: Defendant Klein makes the same motion for the same reason.

Mr. Bender: The same motion, your Honor.

[6865] Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

The Court: Denied.

Mr. Bauman: Both of these exhibits remain in the record.

The Court: I say, denied.

The next is a page 4372, and that concerns itself with Government's 30-A, B C and D, 184 and 108.

Mr. Kiendl: Defendant Klein moves to strike. None of those exhibits are now in evidence. They have all been stricken.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

The Court: Would your notes show, gentlemen, where 108 was received?

Mr. Donohue: It followed 350, your Honor.

The Court: At page 350?

Mr. Donohue: No, it followed Exhibit 350, whatever page that is.

The Court: Oh, I see.

Mr. Tyler: Page 4375.

The Court: Yes. Thank you. The motion [6866] is granted.

And that brings us to the stipulation by the defendants Alprin and Koerner that Government's 116, 117-B, 117-C, 121, 118-B, 119-B, 120, and 179 were all typed on the typewriter in Mr. Alprin's office in New York City.

Mr. Kiendl: Defendant Klein moves to strike out the stipulation as not germane to the fifth count, and calls your Honor's attention to the fact that Exhibits 120, 121 and 179 have already been stricken from the record.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

Mr. Bauman: The Government opposes as regards 117-B, 117-C, and 119-B. I believe 118-B is included in that.

Mr. Kiendl: 116, too.

The Court: Yes, 118-B is included.

Mr. Bauman: I didn't know that. The Government likewise opposes in the case of 118-B.

Mr. Kiendl: You haven't mentioned 116.

The Court: 116 was stricken.

Mr. Bauman: 116 was stricken.

[6867] The Court: 117-B was not. 117-C was not.

Mr. Kiendl: Oh, I am sorry.

The Court: 118-B was not and 119-B was not.

Mr. Kiendl: That is right.

The Court: The motion to strike the stipulation as to Government's 116, 117-B, 117-C, 121, 118-B, 119-B, 120, and 179 is granted, except as to 117-B, 117-C, 118-B, and 119-B.

That brings us to the final stipulation which I believe is about page 4392, a stipulation by defendant Klein that Government's 13-A, B, C, D, E, F, H, I, J, K, Government's 153, 156, and 18 and Defendant Klein's J were all typed on the same typewriter in the office of one of the companies in Baltimore.

Mr. Kiendl: Defendant Klein moves to strike that stipulation on the ground that it is not germane to the issues under the fifth count, and calls your Honor's attention to the fact that 13-A to K, inclusive, with the exception of 13-G are all invoices.

The Court: Yes.

Mr. Kiendl: And that Exhibit 156-B has been stricken from the record.

[6868] Mr. Bender: The same motion.

Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

Mr. Bauman: The Government opposes as to those exhibits remaining in evidence.

The Court: Motion to strike is granted as to Government's 156 only, otherwise denied.

* * *

The Court: * * *

Now we come to Henry G. Burke, whose testimony commences at page 4491 and concluded at page 4523.

Mr. Kiendl: May the defendant Klein first move to strike it out in its entirety on the ground that it is not germane to any of the issues raised by the fifth count. It refers to matters prior to June 1, 1946, except in connection with Mr. Klein's income tax return for 1946.

[6869] Mr. Bender: I am sorry, your Honor. I want to except from the motion to strike certain testimony given by the witness Burke, and that is that beginning at page 4502 the first question down to the answer to the fourth question on the same page.

The Court: Did you say through the answer to the fourth question?

Mr. Bender: I did, your Honor.

The Court: All right. Do you accept that exclusion from your motion to strike?

Mr. Kiendl: No, we do not, your Honor.

The Court: I see.

Any further exclusions, Mr. Bender?

Mr. Bender: Yes, your Honor.

Page 4505, first question and answer.

Mr. Bauman: May I ask if that is the one that starts "Mr. Burke, you over the years in which you have been Mr. Klein's"——

Mr. Bender: That's right.

The Court: Do you accept that exception?

Mr. Kiendl: Yes, we will accept that if Mr. Bender wants it in.

The Court: Any more?

Mr. Bender: Yes, your Honor.

[6870] 4516—no, I will withdraw that 4516, your Honor, if I may.

4521, the last question and answer.

The Court: Does the defendant Klein agree to that exception?

Mr. Kiendl: We will agree to that, your Honor.

The Court: But you nevertheless will not agree to the exception proposed on page 4502?

Mr. Kiendl: No, your Honor. We think that is in a different category.

The Court: All right.

Any more, Mr. Bender?

Mr. Bender: That is all, your Honor. Thank you.

Mr. Donohue: Will your Honor indulge me for just a moment?

(After conferring with Mr. Bender.)

The defendant Alprin moves to strike the entire testimony of the witness Burke on the ground that it has no probative value with respect to the fifth count, but is willing to accept the exception of those portions asked to be retained by counsel for the defendant Haas.

Mr. Bauman: The Government opposes the striking of this testimony, your Honor, with the [6871] exception of that portion of the testimony which

relates to Government's Exhibit 360 starting on page 4503 and ending——

Will the Court bear with me for just one moment, please?

The Court: Surely.

Mr. Bauman: And also, your Honor, including the testimony pertaining to 361 which was the Kirby & Kirby memorandum.

360 and 361 have been stricken and accordingly I shall consent to that part of the testimony starting on the page I formerly gave your Honor and ending——

The Court: You gave me page 4503.

Mr. Bauman: That is correct, sir, and ending at the commencement of Mr. Kiendl's cross-examination on 4507.

(After pause) May I amend that to include all of 4507 because it apparently relates to one of those exhibits.

The Court: Defendants' motions to strike the testimony of the witness Burke commencing on page 4499 of the stenographer's minutes and concluding on page 4523 are granted except——

Mr. Bender: Your Honor, before you rule on [6872] the exceptions, is it possible for me to include one more?

The Court: Surely. What is it?

Mr. Bender: It is on page 4521, the third question and answer.

The Court: Except the testimony commencing with the first question and terminating with the an-

swer to the fourth question on page 4502.

Also, except the first question and answer thereto on page 4505. And also except the fourth or last question and answer thereto on page 4521.

Mr. Bauman: Your Honor, may I at this point address one——

Mr. Bender: You have omitted the third question and answer?

The Court: Yes, I am striking it.

Mr. Bender: I am asking that it be excepted!

The Court: I know you are and I don't go along with you. It was good stage play in front of the jury. You got the most out of it.

Mr. Bauman: In the light of the exception with regard to 4502, your Honor, which your Honor has sustained, may I ask you to consider the remainder of that page?

[6873] The Court: Yes, I think that they are tied together. They should both be in.

So the exception on page 4502 will be extended so that it will commence with the first question on the page and terminate with the answer to the sixth or last question on the page.

Mr. Bender: May I be heard on that, your Honor?

The Court: Yes, you may.

Mr. Bender: Under those circumstances I would like to withdraw my exception and the reason why I say that is because if we put before this jury the testimony of Burke on direct as to the supplemental agreement and the fact that he didn't see the supple-

mental agreement when he prepared his opinion we are again getting into the question of the conspiracy which your Honor has adjudicated, and that wasn't my purpose at all in excepting that portion of 4502.

The Court: Well, you are at liberty to withdraw your exception, but I am at the same time passing upon the Government's objection to the motion to strike and I am sustaining its objection to the extent of excluding from the stricken portion the entire of page 4502.

[6874] You cannot by withdrawing your exception to the motion to strike foreclose the Government from asking a ruling that the Court on the Government's application except a portion that a defendant may have moved to strike.

You will recall that with the exception of one portion dealing with Exhibits 360 and 361, the Government objected to the entire balance, to the striking of the entire balance of the Burke testimony, which is its right. I have to rule on that.

You can't fix the boundaries of a motion to strike in its ultimate decision, no matter how you frame it.

Mr. Bender: Under these circumstances, may I be permitted to withdraw my exception to that 4502?

The Court: Indeed you may. Nevertheless, I am not striking it.

Mr. Bender: Oh, you wouldn't strike it anyway.

The Court: No, because I believe that the Government is on firm ground in asking that it be excluded from the motion to strike.

In other words, what I wanted to get across, Mr. Bender, is that my ruling excepting it from the [6875] motion to strike is not merely predicated upon your excepting it.

Mr. Bender: Well, as long as it is clear that I withdraw my exception.

The Court: Yes. And it is being eliminated from the motion to strike on the Government's opposition to the motion to strike at those portions.

Mr. Bender: That is clear.

Mr. Donohue: May I be permitted in the light of that to withdraw my acceptance or acquiescence to Mr. Bender's exception to the motion to strike?

The Court: Well, I know that under parliamentary law the maker of a motion, if he withdraws it, they generally ask the second to withdraw it, too, but I think in a court if your motion is predicated upon his and its foundation is suddenly pulled away I think yours would go with it.

Mr. Donohue: I am abundantly cautious this morning.

(Laughter.)

The Court: Well, that resolves the Burke testimony and that brings us to——

Mr. Horowitz: If your Honor please——

Mr. Kiendl: I am not certain if I am correct. [6876] Pages 4499 to 4502, inclusive, are now all in?

The Court: Oh, no. 4499 to 4523 are stricken except page 4502, the entire page, the first question

and answer thereto on page 4505, and the last question and answer thereto on 4521. Otherwise the entire Burke testimony is out.

Mr. Kiendl: May I have a minute, your Honor?

The Court: Surely.

May I point out that the question on 4521 is redirect by Mr. Bauman addressing itself to precisely the same matter that appears on page 4502?

Mr. Horowitz: I know, but there was cross-examination before.

Mr. Kiendl: If your Honor please, in view of your Honor's ruling we ask to retain in the cross-examination that part of it beginning at the fifth question on 4517 and continuing down to the conclusion of that cross-examination on page 4521, the second question and answer.

Mr. Bender: The defendant Haas has no objection to that.

Mr. Donohue: Defendant Alprin joins in the request, your Honor.

Mr. Bauman: I think we can all agree that [6877] the case on the bottom of 4518 is the Ron Rico case.

Mr. Bender: Yes.

The Court: You mean that word Valverico?

Mr. Bauman: Yes. I think that is obviously "Ron Rico."

The Court: Yes.

There will also be excepted from the Burke testimony, which was stricken, that portion of his cross-examination commencing with the fifth question on

page 4517 and continuing to the answer to the second question on page 4521.

Now, that brings us to Morris B. Older's testimony commencing on page 4524 and terminating at page 4575.

Mr. Kiendl: Defendant Klein moves to strike out that entire direct examination on the ground that it refers to auditing of the books of Harvey and to the preparation of the income tax returns of Mr. Klein for the years 1944, 1945, and 1946, which has now been stricken from the record and adjudication on the fourth count has already been made adversely to the Government on that subject.

There is nothing in it that is germane to the fifth count.

[6878] Mr. Bauman: Your Honor, may I address a question to Mr. Kiendl?

The Court: Yes.

Mr. Bauman: Did I understand that Mr. Kiendl was limiting his motion to the direct examination of Morris Older?

The Court: No, the page number that I gave brought us through to the end of the witness's cross.

Mr. Kiendl: Your Honor, I did limit it to the direct examination of the witness Older. I want to see if your Honor strikes that out and then move to strike out the cross.

The Court: I am sorry, I misunderstood you, then, because when I gave the page numbers I gave his entire examination.

Mr. Kiendl: Well, I move to strike it all out, if your Honor please. If any of the direct is retained for any reason, we would like to reserve the right to retain part of the cross.

The Court: Yes.

Well, now, the answer to your question now, Mr. Bauman, is that Mr. Kiendl is moving to strike the entire testimony of Mr. Older.

Mr. Bauman: That is right, your Honor.

[6879] The Court: Mr. Bender?

Mr. Bender: In view of the fact that your Honor has admitted the 1947 return of Klein to remain in the record, I would like to move to except from that motion of Mr. Kiendl certain portions of Mr. Older's direct and cross-examination.

And also for the further reason that we have this background information in the record now which dealt with the first four counts.

I would like to exclude the fourth question and answer on page 4561; and 4562, second and third questions and answers thereto; at 4563 the first, second, third and fourth questions and the answers thereto—no, that is the first, second and third questions and the answers thereto.

Mr. Horowitz: Omitting the fourth?

Mr. Bender: I am omitting the fourth question and answer.

4564, the second question and the answer thereto. The following questions and answers that appear at the bottom of 4564 and the answer to the

last question on 4564, which appears at the top of page 4565.

The Court: I take it, then, that you are asking [6880] that we except all the direct testimony commencing with the second question on page 4564 and including the first answer on page 4565?

Mr. Bender: Yes, your Honor.

The Court: Do the parties agree that the third word of the third question is "audit", rather than "order"?

Mr. Bender: That is correct.

Mr. Bauman: The Government agrees to that, sir.

The Court: Any more?

Mr. Bender: Yes. On 4566 the third, fourth, fifth, sixth questions and answers thereto.

That is all on the direct and I have some on the cross.

The Court: Give them to me now because the motion is addressed to the entire testimony.

Mr. Bender: On page 4573, first question and answer down to the last question and answer on that page.

At 4574——

The Court: Now, when you say the last question and answer on that page, I assume that you are eliminating——

[6881] Mr. Bender: The unanswered question, yes.

The Court: All right. What comes next?

Motions to Strike Testimony and Rulings Thereon

Mr. Bender: On page 4574 beginning with the first question and the answer thereto, and all of the questions and answers that follow up to the first answer on page 4575.

The Court: When you say "up to," I construe that to mean "through" the first answer?

Mr. Bender: Yes, through.

[6882] The Court: Mr. Donohue?

Mr. Donohue: I move to strike the entire testimony of the witness Morris B. Older, your Honor.

The Court: Do you wish to be heard, Mr. Bauman?

Mr. Bauman: Frankly, what is running through my mind, your Honor, is that I think that under the patterns involved Older's testimony is not particularly background in any sense, particularly that portion that goes to the 1944, '5 and '6 returns which were excluded on the consent of the Government. However, I——

The Court: I will just read hurriedly through the sections that Mr. Bender proposes.

Mr. Bender: I can't hear you, your Honor.

Mr. Bauman: Sir?

The Court: I said I would read through the exceptions that Mr. Bender proposes.

The motions of the defendants Klein and Alprin to strike the entire testimony of Morris B. Older are granted. The motion of the defendant Haas to exclude certain enumerated portions from said motion to strike are denied.

* * *

[6883] The Court: That would bring us to Rokoff, whose testimony commences at page 4715.

Mr. Donohue: If it please your Honor, with respect to the testimony of the witness Rokoff, may I make a motion, your Honor, to correct the record on page 4814, line 13. Mr. Bauman is apparently in his cross-examination reading from a portion of Government's in evidence 380 and the quoted portion——

The Court: Excuse me. You mean in his direct.

Mr. Donohue: In his direct, yes, your Honor. In his quotation beginning on line 12,

> "accrued commissions and expenses payable to set up agreed commissions."

A reference to the text of the exhibit will show that the word "agreed commissions" should read "accrued commissions."

The Court: Any objection?

Mr. Bauman: No, sir, I don't think there is [6884] any question about that.

The Court: Motion granted.

Rokoff's testimony would appear to commence on page 4717 and proceed to 5205. And this poses a situation where again I think we ought to take it up——

Mr. Kiendl: Seriatim?

The Court: —seriatim or piecemeal, or whichever way you want to characterize it.

Now I made some notes as I analysed the testimony, at least on his direct testimony. If you want

to follow those or do you want to continue as you have, Mr. Kiendl by your identifying——

Mr. Kiendl: I would prefer to take your Honor's notes; it might shorten it.

The Court: All right.

Mr. Bauman: May I, before we address ourselves to this method of working on Rokoff's testimony, suggest to the Court that the testimony of William Rokoff, and I do this in no perfunctory way but quite seriously, be considered as a unified whole on the following grounds:

1. That William Rokoff is named as a co-conspirator in the fifth count.

2. That some of his actions, I think [6885] many of his actions according to the memorandum previously submitted by Mr. Kiendl, are obviously admissible under the fifth count.

3. Having in mind your Honor's determination with relation to matters that antedate the June 1, 1946, conference, the witness Rokoff's entire testimony I respectfully submit is admissible, and,

4. I urge upon the Court that his entire testimony be available to the jury so that it may be evaluated as one unified whole.

The Court: Of course that would presuppose that I knew every bit of his testimony and that in my view every bit of his testimony fell within the category that you define. I don't remember it that clearly.

Mr. Kiendl: There is a great mass of documentary exhibits that have been stricken out, your Honor.

The Court: Yes. I am not going to take it as a whole. What I will do is to suspend now until, if it is agreeable to you gentlemen, say ten minutes past two. That will give us an opportunity to have lunch and also for you to review that testimony and probably have a better idea of what you want to move to strike out and whatnot.

(Recess to 2:10 p. m.)

[6886] AFTERNOON SESSION—2.10 P. M.

The Court: I would suggest that we proceed with your breakdown, Mr. Kiendl, because by comparison in the past yours seems a little more detailed than mine. Perchance if I have something that you skip I will call your attention to it, but I doubt that that will be so.

Mr. Kiendl: Fine, your Honor. We move to strike from the testimony given by the witness William Rokoff that part beginning at page 4722 that refers to Government's Exhibit 372 that has been stricken from the record, and the testimony in that connection continues, I think, down to 4748.

Mr. Bender: I am sorry to hold you up, your Honor. Would you just give me a minute.

(A pause.)

Mr. Bender: The defendant Haas will make no motion with regard to the Rokoff testimony.

Mr. Donohue: Defendant Alprin has no motion with respect to the testimony of the witness Rokoff.

Mr. Bauman: The Government opposes the motion of the defendant Klein to strike the testimony of the witness Rokoff. May I in that connection address the Court, or was your Honor reading the——

[6887] The Court: No, I was reading the section before page 4722 because the motion doesn't include it, and I would assume that it is intended that it remain in.

Mr. Bauman: May I address myself to the motion, your Honor?

The Court: Yes.

Mr. Bauman: In the first place, your Honor, although it is true that the particular exhibit which was introduced in connection with part of this testimony was excluded, as I understand it it was excluded not because it was not a proper part of the fifth count because all of these books were up in Canada in March, 1947 but rather because I understood your Honor to be of the opinion that in having four of these so-called memorandum records in the record that they were sufficiently available to the Government as representative of the others. Now I think, however, that although your Honor has not permitted the introduction or the retention of this particular exhibit, in reading the pages that the defendant Klein has asked you to strike your Honor will see that there is a great deal of material in there that does not address itself particularly to the exhibit

which your Honor [6888] has stricken from the record, but goes in some detail to the keeping of all these records, and from that point of view, sir, I object to the motion of the defendant Klein.

The Court: (After a pause) Well, I have tried to extract from the Rokoff direct between pages 4722 and 4747 the portions that might address themselves to testimony other than Exhibit 372. We will have to take it up separately.

The first exception thus characterized would be at page 4733, the second question, starting with the second line of that question:

"Q. Have you rewritten pages of books on occasion?"

Mr. Bauman: Did your Honor say 4733?

The Court: Yes.

Mr. Horowitz: 3733, second question, second line.

The Court: Now this testimony starting with the last part of that sentence:

"have you rewritten pages of books on occasion?"

and going down to the last answer on page 4735 would appear to me to address itself not specifically to [6889] Government's 372 but as to his rewriting of books generally. And I take it that is the category to which you address your objection—that is one of them.

Mr. Bauman: That is one of them, sir, yes.

Mr. Kiendl: And our contention would be in connection with that, if your Honor please, that it

has no rational probative force so far as the fifth count is concerned in any event.

The Court: Before we get to that specific consideration, I don't want to become involved in any misunderstanding as to the import of the statements by the defendants Haas and Alprin that they made no motion with respect to any of the Rokoff testimony. I am impelled to question counsel for these two defendants whether they are resting upon the fact that this testimony was excluded as to them originally when it came into the record.

Mr. Donohue: Not only on that basis, if it please the Court.

Mr. Bender: No.

The Court: Because what I have in mind is this, gentlemen: The technique that has been applied [6890] heretofore, if a defendant's motion to strike were denied the Government would then get up and ask that the testimony be received as against those as to whom it was originally excluded. And if I were to grant that motion I might then be confronted in that new posture with a motion to strike on behalf of those two defendants, and that is the reason I raise it. I want to avoid a circuity of motions to strike, if I can.

I suppose the best way is by trial and error, see what happens with respect to one of these specific areas and then feel our way from then on.

Well, in what way, Mr. Bauman, does the fact that Mr. Rokoff rewrote books when he smudged them or the ink eradicator went through the page

and offending his aesthetic sense, or when he deliberately or otherwise tore off the number of a page—in what way does that address itself to the conspiracy charged in the fifth count?

Mr. Bauman: I respectfully suggest that in any event if the jury were to believe, as they might believe from all his testimony, they might believe his testimony about his taking instructions from Klein about entries, or they might believe his testimony about pursuant to Klein's direction he took all these books up [6891] to Canada in March of 1947, they might conclude from the fact that at that time he according to his own story conformed the so-called Cuban books and the memorandum records; the fact that at that time they might conclude that, certainly pursuant to Klein's direction, and if not to Klein's direction to Ellis Rosenberg's direction, certainly with his knowledge rewrote the books of Tivoli in a book that was purchased on that occasion in Canada, that the rewriting of books, was not for purposes of neatness necessarily alone, but the jury could, from those facts and from all the facts in the record and all the facts in Rokoff's connection with Ellis Rosenberg and the defendant Klein, conclude that this was a part of a scheme to impede the Government in the collection of revenues, because in a scheme addressed to revenues, your Honor, books are a prime means, or one of them—I don't say *the* prime means but *a* prime means—of determining, assessing, collecting and performing the governmental function of collecting revenue.

(After a pause) May I address one further remark to your Honor?

The Court: Yes.

Mr. Bauman: Because your Honor said some-[6892] thing about a page at the end, 4735. May I call your Honor's attention to 4736?

The Court: Well, I haven't come to that yet.

Mr. Bauman: I beg your pardon.

Mr. Kiendl: May I call your Honor's attention to the fact that in answer to Mr. Bauman's argument so far as we are aware there is no evidence in this record whatsoever that any of the entries in any of the books were false, and how that bears on this scheme of throwing sand in the eyes of the Government we are wholly unable to see, and we move to strike it all out.

The Court: Well, I can't go along with that, Mr. Kiendl, because the third question on page 4733 following the portion where I started, ". . have you rewritten pages of books on occasion? A. Yes, sir, I have.

"Q. And books of corporations connected with this Harwood whiskey situation? A. Yes, I believe I have. It is very possible."

Mr. Kiendl: There is nothing false about that that we see, your Honor.

The Court: O, I see. I misconstrued your [6893] statement. I already arrived at the inference that Mr. Bauman urges, and that is that the jury might very well find and disbelieve the reason

for Rokoff's alleging that he rewrote the books, and they might in connection with all the other things Mr. Bauman mentioned come to the conclusion that he wrote the books for an entirely different purpose.

Mr. Kiendl: It is pure speculation, your Honor, permitting the jury——

The Court: Well, the line of demarcation between speculation and a reasonable inference beyond reasonable doubt is not a positive line. We recognize that.

Mr. Kiendl: It must be rationally probative.

The Court: Well, you and I may differ about that. But if I were sitting over on the side of the room in one of those twelve chairs, I may find that it was rationally probative if I thought a man has told me, if I may be permitted to characterize it, a cock-and-bull story about rewriting the books because he tore the number off one of the pages and I might infer from that that he rewrote them for a different purpose.

I don't think that it is necessary, in [6894] order for the jury to come to that inference, that there has to be a positive acknowledgement from Rokoff that he did it for fraud, otherwise you would never be able to prove a conspiracy to defraud in any court of law because fraud, as we know it in these types of conspiracies, is a clandestine, surreptitious thing. They don't shout them from the housetops.

Mr. Kiendl: Well, not only to have intent, but you have to have fraud in connection with a con-

spiracy alleged in the fifth count and——

The Court: You are coming to the ultimate in toto. I am sidestepping for the time being the question of intent and the specific type of conspiracy. And Mr. Bauman, in urging that this be retained and that the motion to strike be denied as to this part, argues that he can persuade the jury that this other element exists, but if he can persuade the jury that the other element exists he believes, and I think with great merit, that he has a right to have this testimony remain in for whatever inferences the jury may beyond a reasonable doubt draw. And under the circumstances I am going to exclude from whatever disposition, if I do grant and I [6895] undoubtedly will from my knowledge of the record, some part of the motion to strike the Rokoff direct, and I am excluding therefrom commencing with the second line of the second question on page 4733, the balance of that page, all of page 4734 and all of page 4735 down to and including the last answer.

The next area not concerning itself with Government's 372, I would think commences with the first question—withdrawn.

Commencing with the second question on page 4736, omitting the colloquy between Mr. Greenman and the Court, on page 4737 and continuing down to the answer to the third question on page 4738, would appear to fall, in my view, in the same category, i.e., testimony addressing itself not solely to Government's 372.

Mr. Kiendl: I think that is right, your Honor.

The Court: And I will make the same ruling with respect to that, i. e., it will not be included in the portions stricken.

Again, it would appear to me that commencing with the seventh question on page 4740 the testimony does not address itself specifically to 372, continuing [6895a] down to the answer to the third question on page 4741.

Mr. Kiendl: That is right.

The Court: However, I am not so much persuaded here, Mr. Bauman, that this recital of the preparation of the bills falls as clearly or—well, I won't say that—what I have excluded here in these two areas clearly falls within the fifth count, but I am prepared to give the Government the benefit of it. But I fail to see where the fact that he prepared the bills in the office in Baltimore comes within anything other than the first four counts in the alleged sham of the corporation which I have since thrown out.

Mr. Bauman: With relation to that, I would agree with your Honor that it is not of the same effect.

The Court: I have attempted to extract from the area that Mr. Kiendl moved to strike out everything that dealt with anything other than 372, and this is in that category, but I fail to see where that falls within the fifth count. If it does, it is very remote.

Mr. Bauman: No. I only suggested it as background as a very general and not a prejudicial nature.

[6896] The Court: I see.

Mr. Bauman: As to that particular phase, sir, as to the preparation of the invoices.

The Court: All right.

Now, then, that would bring us now to the end of the testimony regarding Government's 372 which was stricken, and I believe that occurs on page 4747.

Mr. Kiendl: Then it goes to Exhibit 373.

The Court: Yes. Well, then, Defendant Klein's motion to strike all of Rokoff's direct appearing on pages 4722 to 4747 is granted except the portion indicated as follows:

Commencing with the words "Have you rewritten pages of books on occasion," contained in the second question on page 4733 through the answer to the fourth question on page 4735, and beginning with the second question on page 4736 through the answer to the third question on 4737, beginning again on that page 4737 with the fourth question and continuing through the answer to the third question on page 4738.

Now, Mr. Reporter, would you read back my statement and see whether I have made a ruling there?

(Record read.)

[6897] Mr. Bender: Your Honor, with regard to 4736, it is the second question, not the first ques-

tion? Beginning with the second or beginning with the first?

The Court: Beginning with the second, "As a matter of fact, in March of 1947"——

Mr. Bender: Thank you.

The Court: Because you will see Mr. Bauman talked about retaining several of those pages and then the question before was speaking of the records reflecting Exportadora de la Costa which was 372, so I have eliminated that.

Mr. Bender: Thank you very much, your Honor.

The Court: All right.

Mr. Kiendl: Defendant Klein moves to strike from the testimony of the witness Rokoff the testimony that appears beginning with the end of the page 4747, the last question, and continuing through the end of page 4760, on the ground that that all refers to an Exhibit 373 that has been stricken from the record and has no bearing whatever on any of the issues raised by the fifth count in the indictment.

The Court: Would you read Mr. Kiendl's statement?

(Record read.)

[6898] The Court: Now, I take it that the defendant Haas and Alprin have indicated that they plan no motion with respect to any of the Rokoff testimony, is that correct? So I won't ask each time what your position is. Do I correctly understand, Mr. Bender?

Mr. Bender: That is what I said, yes, your Honor.

The Court: All right.

Mr. Bauman: May I speak to this——

The Court: Yes.

Mr. Bauman: With relation to this particular exhibit, I would merely suggest to the Court that this book, Government's Exhibit 373, Ramsay, Scott, was one of the books referred to in this testimony as having been in Canada in 1947, and the witness engaged with me in a little discussion whether he was working with the book or from the book, but it is clear that he had the book up there. And it is one of those books, as was the case, I believe the Court will remember, with relation to every one, wherein he said, as I asked him at page 4757, that every entry in this book or in that book was made upon the instructions of Hyman H. Klein. And while the book is no longer in evidence, sir, I think the [6899] jury is entitled to the full picture that this is one of the eight books that was up in Canada on which or from which Rokoff was working under the circumstances we previously had discussed in the spring of 1947.

The Court: Well, is there a part of the record that indicates what books he had in Canada?

Mr. Bauman: I believe there is, but I will have to look through my——

The Court: I have no objection to leaving in a general reference, but if you are going to select each one of these—where, for example, is the testi-

mony that the memorandum records of Ramsay, Scott were one of those in Canada?

Mr. Bauman: Well, that would appear, sir, at page 4758. May I call your Honor's attention to the last two questions, not the very ones on the bottom, but the two questions above that on page 4758.

In answer to a previous question, my recollection is there is somewhere in the minutes the fact that he had all of these books up in Canada.

The Court: I think the most you would be entitled to have excepted, Mr. Bauman, from the motion to strike that portion, would be the sixth question on page 4758 and the answer thereto. Then, [6900] with the exception of the sixth question and the answer thereto on page 4758, the defendant Klein's motion to strike the testimony of the witness Rokoff commencing with the third question on page 4747 and continuing through the unanswered question, unanswered fourth question on page 4760, is granted.

Mr. Bauman: I wonder if I might just refer your Honor to one part of that?

The Court: Surely.

Mr. Bauman: Page 4759, starting with the second question on that page.

The Court: That addresses itself specifically to 373.

Mr. Bauman: I think you are right. All of those do. I will withdraw that, your Honor.

The Court: Yes. Now we are up to the portion of the minutes on page 4761 where Government's 374 was marked for identification.

Mr. Kiendl: Defendant Klein moves to strike from the testimony of the witness Rokoff all that follows beginning at page 4761 down to and through the first line on page 4769, on the ground that that has no probative value so far as the fifth count is concerned, referring as it does to Exhibit 374 which [6901] was the Exportadora Kent memorandum record that has been excluded and stricken from this record.

The Court: What was the terminal point of that, Mr. Kiendl?

Mr. Kiendl: The first line on page 4769—through the first line before the redirect examination. The direct examination was continued by Mr. Bauman.

The Court: You are excluding Mr. Bauman's first question on page 4769?

Mr. Kiendl: Well, I hadn't made a motion to strike that yet, your Honor.

The Court: Well, isn't that tied in with the testimony about Government's 374 which we are now considering?

Mr. Kiendl: Yes, it is, directly.

The Court: Would you want to include that in your motion, or do you want to reserve it?

Mr. Kiendl: Will your Honor give me just a minute?

(After pause) I was going to move to strike that and all that follows on the ground that it was not germane to the fifth count.

The Court: All right, then, we conclude the

present consideration with the end of the first line [6902] on page 4769.

Now, Mr. Bauman, you have Mr. Kiendl's motion. What, if anything, is there in that testimony addressing itself to anything other than Government's Exhibit 374 which my notes——

Mr. Bauman: I have no specific request, sir,——

The Court: None?

Mr. Bauman: —to make with relation to those pages up to but not including the first question on page 4769.

The Court: The defendant Klein's motion to strike that testimony is granted.

Now, that brings us to the interrogation as it appears starting with the first question on page 4769.

Mr. Kiendl: We move to strike that out, if your Honor please, beginning at that point and continuing down to the words "Mr. Bauman" on page 4771, a little below the middle of the page, on the ground that that evidence is not germane to the issues in the fifth count of the indictment, and that with the exception of the first question and answer it does not refer specifically to any excluded exhibit.

[6903] The Court: Defendant Klein's motion to strike Rokoff's direct testimony beginning with the first question on page 4769 and terminating with the answer to the sixth question on page 4771 is granted except the portion commencing with the fourth question on page 4769 through the answer to the first question on 4770, resuming the exception

at the fourth question on 4770 through the answer to the sixth question on 4771.

That brings us down to the portion of the minutes at 4771 where Mr. Bauman had Government's 375 marked for identification. Now, that also was one that was stricken ultimately?

Mr. Kiendl: That was Waldorf. We move to strike that, if your Honor please, beginning at the point Mr. Bauman asked to have it marked for identification, down to and including the first question and answer at the top of 4778 on the ground that that all refers with the very slight exception to an exhibit that has already been stricken from the record.

The Court: Did you say down through the first answer on 4778?

Mr. Kiendl: Yes, your Honor.

[6904] The Court: Do you wish to be heard on that, Mr. Bauman?

Mr. Bauman: Would your Honor give me just one moment?

The Court: All right.

Mr. Bauman: No, sir, I do not wish to be heard.

The Court: All right, then, the defendant Klein's motion is granted on the Rokoff testimony beginning with the seventh question on 4771 through the answer to the first question on 4778, and that testimony is stricken.

Mr. Kiendl: If your Honor pleases, I move to strike the testimony of the witness Rokoff beginning at page 4778 after the first question and

answer and continuing through the first question and answer at the top of page 4780 on the ground that that testimony has no bearing on any of the issues under the fifth count of this indictment, and that that all refers to matters other than particular exhibits that have been excluded, I think.

Mr. Bauman: The Government opposes that motion.

The Court: Denied.

[6905]Mr. Kiendl: Defendant Klein moves to strike the testimony beginning with the second question on page 4780 down to and through the first question and answer on page 4781 on the ground that that testimony all refers to an exhibit that has been stricken from the record.

The Court: Granted.

Mr. Kiendl: Now, if your Honor please, the defendant Klein moves to strike beginning with the second question on page 4781 down to four lines from the bottom of page 4784 on the ground that that evidence is not pertinent to any issue under the fifth count and that it refers to an exhibit, the Seaboard memorandum records, which has been stricken from the evidence.

The Court: Granted.

Mr. Kiendl: Now, if your Honor please, the defendant Klein moves to strike beginning at page 4784, beginning at the fourth line from the bottom of 4784 and continuing to approximately page 4811 on the ground that that evidence is not material to any issue under the fifth count of the indictment.

But I call your Honor's attention to the fact that it refers to memorandum records kept by [6906] the witness Rokoff of companies, the exhibits being received in evidence over the objection of the defendants. It is Exhibits 377, 378, 379, 380 and 381.

The Court: There will be a 15-minute recess.

(Recess)

The Court: Any comment with respect to that portion of the testimony?

Mr. Bauman: Yes, sir. I think all of that testimony that Mr. Kiendl seeks to have stricken is properly in the record with relation to the fifth count because all of that testimony, as I remember having read it, deals with exhibits presently in the record and which remain in the record.

The Court: Well, it doesn't necessarily follow, I think I have indicated heretofore, that testimony remains in the record because an exhibit remains an exhibit any more than it follows that testimony goes out because an exhibit goes out.

Mr. Bauman: I understand that, your Honor.

The Court: I may be mistaken, but my recollection is that these Government's 377, 378, 379 and 380 were more or less bellwether or sample——

[6907] Mr. Bauman: Selected for a specific purpose, though, I believe, your Honor. There was a reason why it was these four rather than the other four, which I think I can refresh your Honor's recollection of.

The Court: Well, I will read it through.

Mr. Bauman: Two of them related to the $3 million entry or failure thereof.

The other one was the Regan Potter and the other one was Tivoli.

The Court: Yes, that is right.

[6908] I have read through this testimony, Mr. Bauman. I don't find any reference to any testimony regarding specific entries in the books by Rokoff. There were instances where Mr. Kiendl or yourself or both took the books before the jury and paraphrased entries, but there isn't any testimony by Rokoff there dealing with any entries, unless I have missed it.

Mr. Bauman: May I point out just one or two things?

The Court: Keeping in mind that you have the books and for whatever value they are, they are in evidence, I can't for the life of me see where Rokoff's testimony becomes important. Will you point it out to me? I might have missed it.

Mr. Bauman: I will try to, Judge.

The Court: Will you, please?

Mr. Bauman: I am particularly interested with relation to Government's Exhibit 379, which are the books of Regan Potter, and they are identified by Mr. Rokoff as being in his handwriting.

"Q. And that is true of everything that is readable in that set of books? A. That is right.

"Q. With the exception of one entry on the page? [6909] A. Oh, I am sorry, I didn't see that.

"Q. On the page numbered 24, is that correct?"

And your Honor will remember that is the entry about which Miss Bennett testified, that that entry was in her writing.

The Court: What page are you reading from?

Mr. Bauman: Page 4797 and 4798, starting with the middle of 4797, where I resumed the interrogation.

The Court: All right. Where else?

Mr. Bauman: Now, I had a moment ago a reference in the record to a stipulation that this was a bound book. I would like to retain that, as well as the stipulation contained on page 4801, sir.

Mr. Bender: 4803, I think.

The Court: Are you referring to 4803?

Mr. Bauman: Your Honor, there again he summarizes it, yes, but I think there was a previous place where Mr. Kiendl specifically——

The Court: He says so again on—just a moment. Mr. Kiendl starts on 4802 and he says, on 4803, it is part of this statement, "it was a bound book, all bound together, and not looseleaf the way it is now."

[6910] Mr. Bauman: That is correct, your Honor.

The Court: Does that conclude your comment, Mr. Bauman?

Mr. Bauman: Yes, your Honor, it does.

The Court: All right. The defendant Klein's motion to strike that portion of the Rokoff direct testimony which commences with the fourth line from the bottom of page 4784 and terminates with

the last answer on page 4812 is granted, except the last question on page 4797 and the answer thereto on page 4798 and the first four questions and answers thereto on page 4798, and also excepting therefrom the second full paragraph on page 4803, wherein Mr. Kiendl and the Government stipulated that Government's 379 was a photostatic copy of the cover and certain pages of the bound book of account of Regan, Potter & Company.

Mr. Bauman: May I refer Honor to page 4801, which is a stipulation to the effect that those pages not reproduced in the exhibit in evidence were blank in the original book.

The Court: I don't think that is necessary. I think the stipulation contained on page 4803 is ample. I can assure you if anybody would undertake to argue to the jury that only a portion of the exhibit [6911] has been introduced, the Bench would have something to say about that.

Mr. Bauman: Did I understand your Honor to say page 4812? I thought Mr. Kiendl had not quite gotten to page 4812.

Mr. Kiendl: Yes, through 4811, which is up to 4812.

Mr. Bauman: I am sorry.

The Court: The way I understood Mr. Kiendl's original motion, he characterized it as going down through the answer to the fourth question, which would be the last answer on page 4812.

Mr. Kiendl: That is right.

The Court: Is that correct, Mr. Kiendl?

Mr. Kiendl: I thought I said to approximately page 4812.

The Court: Well, now, I recall; you are right and I am wrong. I assumed that the last answer on page 4812 concluded that area of the interrogation. Now, I may be mistaken.

Mr. Kiendl: Your Honor, I was a little reluctant to strike out the question that the Court asked and I wanted to treat those separately. That is the reason I stopped at approximately 4811.

* * *

[6912] The Court: I don't share your reluctance.

Mr. Kiendl: I know that, your Honor. I was going to move to strike it, in any event. But I will take that all in down to the bottom of 4814.

The Court: It overlaps; it takes in some of the exhibits that were stricken and at least 377 and 378, which were retained in evidence.

Do you have any objection to terminating your motion at the end of the last answer on page 4812?

Mr. Kiendl: Not at all, your Honor.

The Court: All right. Then that will be the area.

Mr. Bauman: May I in that event, sir, call your Honor's attention to limited portions of other pages?

The Court: Surely.

Mr. Bauman: Page 4805, starting with the second question from the bottom, the first six questions I think it is on 4806.

The Court: No, I see no purpose in making any exception for those.

Mr. Bauman: It merely sets forth that all of these books were up there at one time in March 1947 and that the Tivoli book was up there along with them.

[6913] The Court: I don't read it that way.

"Q. Were those all the books you brought up on that occasion? A. I brought up what books I had.

"Q. Were Government's Exhibits 372 to 379, inclusive, all the books that you brought to Canada with you in March 1947? A. No, sir."

And then he added,

"A. There was a book here.

"Q. Tivoli? A. Yes, sir."

I don't see any reason for enlarging upon the exception.

What other page did you have in mind, please?

Mr. Bauman: The stipulation at page 4810, with relation to Tivoli, your Honor, starting with the comment of the Court after the receipt of Exhibit 380 into evidence.

The Court: At what page?

Mr. Bauman: 4809, in the middle of the page there is a notation "Government's Exhibit 380 in evidence" below that.

I think actually I should have started my request at about page 4810 where the Court says, [6914]

"But I take it the stipulation as to 380 is the same as the Government's 379."

The Court: Except that Mr. Kiendl didn't stipulate.

Mr. Bauman: Will your Honor read just a little further?

The Court: You mean at the top of page 4811?

Mr. Bauman: Yes, sir.

The Court: All right. There will be included in the exception the stipulation contained in the colloquy between Mr. Kiendl, Mr. Bauman and the Court commencing at the bottom of page 4810 and ending at the end of the ninth line on page 4811, i.e., that Government's 380 was a photostat of a bound volume and that blank pages in the original were not photostated.

Mr. Bauman: That is all, sir.

The Court: Now, then, that brings us to Rokoff's direct testimony commencing with the fifth line from the bottom of page 4812.

Mr. Kiendl: Defendant Klein now moves to strike from the testimony of the witness Rokoff that portion of the testimony which begins at the fourth line on page 4819 and continues through page [6914a] 4826, on the ground that it has no rational or probative value so far as the fifth count of the indictment is concerned. It is testimony regarding Exhibit 380, which was one of the exhibits your Honor included.

The Court: Off the record.

(Discussion off the record)

Mr. Kiendl: Through the fourth question and answer on that page is what I should have said.

[6915] The Court: (After reading) Defendant Klein's motion to strike out the testimony com-

mencing with the first question on page 4819 of the stenographers' minutes and continuing down through the answer to the fourth question on page 4826 is denied.

Mr. Kiendl: The defendant Klein moves to strike from the testimony of Mr. Rokoff that part beginning with the first question and answer on page 4827 and continuing to and through the first question and answer on page 4829 on the ground that that refers to Kirby and Kirby, which is now out of the case so far as the fifth count is concerned.

Mr. Bauman: May I say the Government has no objection to that, sir?

The Court: The defendant Klein's motion is granted and the testimony of Rokoff commencing with the first question on page 4827 and ending with the first question and answer on page 4829 is stricken.

Mr. Kiendl: The defendant Klein now moves to strike from the testimony of the witness Rokoff that portion of the testimony beginning with the resumption of his direct testimony on page 4840 and continuing through the first four lines on page 4868 on the ground that that is not germane, material or relevant to any of the issues involved in the fifth [6916] count of the indictment.

I call your Honor's attention to the fact that all that testimony is directed to Exhibits 379 and 381 which your Honor permitted to remain in the record.

The Court: Any comment, Mr. Bauman?

Mr. Bauman: I have gotten up to 4841, your Honor. I would suggest that as to those trial balances and balance sheets which were, I think, Government's 381——

The Court: Yes?

Mr. Bauman: That the testimony of the witness Rokoff is necessary in explanation of the later development involving the discrepancy, sir, between the books of Regan Potter and the trial balance of Regan Potter, which I am sure are coming along. I have not gotten up to page 4868 yet. I would like just a moment or two to——

The Court: All right.

Mr. Bauman: (After a pause) May I comment as I go along?

The Court: Well, if you give me the page numbers so I can follow you.

Mr. Bauman: Yes.

At page 4851 and 4852 it appears that Mr. Rokoff there talks about Mr. Haas and seeing Mr. Haas, the fact [6917] that he gave Government's 381 to Mr. Klein.

The Court: I fail to see what connection that would have with the fifth count. It is too remote I think, 381 being the balance sheets, and of course not being the book in which an entry was made by Mr. Bennett.

Mr. Bauman: Well, your Honor, the whole upshot of those balance sheets and trial balances I suggest goes to the heart of the fifth count because it is proof—at least the jury can regard this as proof

—that that Regan Potter book must have been rewritten in that the Regan Potter trial balances contained in 381 which were dated December 31, 1946, revealed a completely different state of affairs than the actual book of Regan Potter, Government's 379, I think it was.

Now I have urged upon the Court that the rewriting of the books is a proper circumstance in the fifth count, and the combination of 381 and 379 seems to me the clearest kind of proof that 379 was in fact rewritten because as I remember what Rokoff said in this area those trial balances were prepared on or about November 31, 1946, and the book 379 which purports to be the book of Regan Potter could not possibly have been the book from which Rokoff drew those trial balances.

[6918] The Court: But his testimony on page 4852 was that he did not give them to Haas; he gave them to Klein and he doesn't know what Klein did with them.

Mr. Bauman: Yes, I wasn't addressing myself to that sole problem. I thought when your Honor said it was too remote you were talking about the entire thing. As far as his turning them over to Klein is concerned it places the trial balances in Klein's hands and nothing more. I acknowledge that. I think it is properly before the jury when read in the light of what happened with relation to those trial balances and Regan Potter's books. However, that is not the point that I am particularly pressing. I am addressing myself to——

The Court: No, well, I think that is in the area of being remote. I am not going to make an exception of that particular piece of testimony. What would be the next that you would invite my attention to?

Mr. Bauman: May I direct the Court's attention to 4857, the second question from the top of the page, which is where I believe I am getting into the area about which I have just spoken with the Court.

(After a pause.) And I would ask your [6919] Honor to retain that portion of the testimony starting at that second question to page 4868.

The Court: The defendant Klein's motion to strike the Rokoff direct commencing with the first question on page 4840 and terminating with the first answer on page 4868 is granted except commencing with the second question on page 4857 through the answer to the fifth question on page 4858, and resuming with the sixth question on page 4858 down through the seventh question on 4859, and resuming with the answer to that question, to wit, the first answer on page 4860 through the second question on page 4861, and resuming with the answer to the second question on page 4861, continuing with all of page 4862, all of page 4863, all of page 4864, all of page 4865, all of page 4866, all of page 4867, and down through the first answer on page 4868.

In essence I have excluded in granting the mo-

tion more than I have included, but it just has to be that way.

Mr. Kiendl: Am I correct your Honor, that you have excluded from 4857 to 4868 only some colloquy?

The Court: Yes, you are correct.

Mr. Kiendl: That is what I thought.

[6919a] The Court: At this point I think we will suspend, gentlemen, until 10.30 tomorrow morning.

(Adjourned to July 12, 1955, at 10.30 o'clock a.m.)

* * *

[6921] The Court: Now, let's see. We reached the point in the Rokoff testimony through the first question on page 4868, is that correct?

Mr. Bauman: Yes, sir.

Mr. Kiendl: That is correct.

The Court: All right. Will you take up from there, please.

Mr. Kiendl: The defendant Klein moves to strike from the testimony of Mr. Rokoff the testimony that appears beginning with the first question on page 4868 and continuing through to the last question on page 4880, all that testimony being directed to checks from Cameron Stuart to Continentale for $3,000,000 and from Continentale to Cameron Stuart for $3,000,000 and the book entries regarding those items. We move to strike that out on the ground that it has no pertinency so far as

the fifth count of the indictment is concerned, all these intercorporate transactions having been adjudicated finally by the decision of the motions to acquit under the first four counts.

The Court: Do I understand that the terminal point is the answer to the last question on page 4880?

Mr. Kiendl: Yes, your Honor.

Mr. Bender: (After a pause) I am sorry, [6922] your Honor. We took our position yesterday.

The Court: Oh, yes, I had forgotten. Excuse me.

Mr. Bauman: The Government opposes that. I merely think Mr. Kiendl inadvertently remarked that all of those pages applied to the three million. My notes indicate that that goes through 4875, about half way through the page. Then we came back to the discussion about the books of Regan Potter on pages 4875 and 4876. Then at the bottom of 4876, your Honor, I started to discuss with Mr. Rokoff the question of Cameron Stuart having paid royalties in the amount of three and a half million dollars and various other sales expenses to different corporations; so that I think the $3,000,000 ends at the middle of page 4875. The Government objects of course to that testimony being stricken.

[6923] Mr. Kiendl: Your Honor, in view of Mr. Bauman's statement, which I find to be correct, may I amend the end point of that motion to strike?

The Court: Surely.

Mr. Kiendl: And make it at the end of the third question on page 4875. And I make a separate motion as to the rest. The end of the third question and answer page 4875. All that does refer to the $3,000,000, as I stated.

The Court: Denied.

Mr. Kiendl: Defendant Klein now moves to strike out from the testimony of Mr. Rokoff that portion beginning with the fourth question on page 4875 and continuing through to the last question on page 4880.

Mr. Bauman: Your Honor, the Government opposes as starting with the fourth question on page 4875 where, as will appear from the record, I attempted more specifically to find out from Mr. Rokoff who directed him to make the entries previously referred to in the record, through the next to the last answer on page 4876. As to the remainder, sir, with the exception of the next to the last question on page 4879, your Honor. That is the extent of the Government's objection to the motion to strike.

[6924] The Court: Defendant Klein's motion to strike the testimony on direct of the witness Rokoff commencing with the fourth question on page 4875 and terminating with the answer to the fifth question on page 4880 is granted, except that portion commencing with the fourth question on page 4875 and terminating with the answer to the fifth question on page 4876. That is the only exception to that motion.

Mr. Kiendl: Shall I proceed, your Honor.

The Court: Just one moment, please; I want to make a note of that on my records.

All right. Thank you for waiting.

Mr. Kiendl: Defendant Klein moves to strike the testimony of the witness Rokoff, that is that portion of it beginning with the last question at the bottom of page 4880 and continuing through to the answer to the fourth question on page 4902, on the ground that the evidence is no longer germane to any issue that is in the case nor covers matters that have been disposed of by your Honor's rulings on the motions for acquittal on the first four counts.

The Court: Any comment, Mr. Bauman?

Mr. Bauman: I will just go through it as quickly as I can.

[6924a] The Court: All right.

Mr. Bauman: I would refer the Court to the third question from the bottom on page 4882 and continuing through the second from the bottom question on 4884, sir. Shall I specify others as I come to them?

The Court: Yes, if you will, please.

[6925] Mr. Bauman: Page 4886 starting with the question on the very bottom of the page and terminating with the third answer—including the third answer from the bottom of 4887.

Starting with the fifth question on 4893, your Honor, and terminating with the first answer on 4894.

That is all I wish to call to the Court's attention in that area, sir.

The Court: Motion is granted; no exception.

Mr. Kiendl: The defendant Klein now moves to strike out that portion of the witness Rokoff's testimony beginning with the first question at the bottom of page 4903 and continuing through the answer to the first question on page 4927 for precisely the same reason.

I don't know whether your Honor wanted me to break this up into smaller segments. I am sorry you have to read——

The Court: No, if the Government wants it broken down they can ask for exceptions.

Now do I understand that you are terminating this area at the second answer on page 4927 which is the answer to the first question on [6926] that page?

Mr. Kiendl: The answer to the first question on that page, that is right.

The Court: All right.

Mr. Bauman: If your Honor will wait just a moment I think I can save you the time of reading through a good deal of this because I think a good deal of it is within the area that your Honor has permitted to be stricken before. So if you will wait I will——

The Court: All right.

Mr. Bauman: (After pause.) It would appear to me, your Honor, that I have no specific request to make with relation to that area.

The Court: Motion granted.

Mr. Kiendl: Defendant Klein now moves to strike out from the testimony of the witness William Rokoff that part beginning at page 4927, the second question on that page, and continuing to the end of the direct examination on page 4955, first line. It all refers to the Tivoli situation, the subscription to the stock, cancellation of the stock if there were a cancellation, Tivoli and Hannes bank accounts, payment to him of [6927] $22,500.

Mr. Bauman: With the exception of the colloquy, your Honor, I shall oppose that motion.

(After pause.) I suppose I should point out the testimony to which Mr. Kiendl refers goes to 4951, your Honor, and then there is a discussion starting on 4951 until the end of Mr. Rokoff's testimony which has to do with the circumstances under which he got $22,500, which is a somewhat different area.

[6928] The Court: Well, it would appear to me that the area which concludes the alleged stock subscription ends with the recess called on page 4950 rather than the point indicated by you at page 4951, Mr. Bauman.

Mr. Bauman: You are correct, sir.

The Court: Or the point indicated by Mr. Kiendl at page 4955.

In any event, I will consider the motion to strike as being the testimony of Rokoff on direct commencing with the second question on page 4927 to the recess on page 4950, and the motion to strike

is denied. However, I will of my own motion exclude from that, not as an exception but rather as an exclusion, certain colloquy as follows:

The colloquy following the answer to the second question on page 4927 between Mr. Greenman, the Court, Mr. Bender; all of page 4928; all of page 4929 down to the first question; the colloquy between Mr. Greenman and the Court between the fourth question and the answer thereto; the colloquy between Mr. Greenman and the Court—oh, I beg your pardon, on that last one did I give you page 4930?

Mr. Bender: No.

[6929] The Court: Then on page 4931, colloquy between Mr. Greenman and the Court between the third question and the interrupted answer thereto; all of page 4932; all of page 4933; all of page 4934; that portion of page 4935 which precedes the second question; colloquy on page 4936 between Mr. Greenman and the Court following the eighth or last question on that page; colloquy between Mr. Greenman, the Court and Mr. Bauman on page 4937 following the answer to the second question and down to the third question; colloquy on page 4938 following the answer to the fourth question, and continuing on page 4939 down to the first question on that page; colloquy on page 4940 following the third question.

Mr. Kiendl: Your Honor, I am a little confused. May I go back for a minute?

The Court: Surely.

Mr. Kiendl: To page 4938 and begin with the words:

"Mr. Bauman: I offer the exibit in evidence."

Your Honor received it at 4939. Is that all stricken out?

The Court: Yes. Starting with the words [6930] "I offer Government's Exhibit 389 in evidence", I am expecting from my denial of the motion to strike or, rather, excluding all of the colloquy and that portion commences after the answer to the fourth question on page 4938, continues for the balance of that page and continues on page 4939 to the first question.

Mr. Kiendl: Doesn't your Honor want your ruling that Exhibit 389 is received in evidence?

The Court: Well——

Mr. Kiendl: Well, I am just suggesting it. I am not——

The Court: Yes. Well, the point is tnis——

Mr. Kiendl: Mr. Bauman offered the exhibit, the Court received it and it was read. That is all stricken out?

The Court: Just a moment. The defendants moved to strike 389 and that motion was denied, so 389 is in.

Mr. Kiendl: That is what I thought, your Honor. It is in——

The Court: Well, I see your point, yet I think I am right, for this reason, that regardless [6931] of whether the testimony—that is not testimony:

you see, I am dealing with testimony of Rokoff. Now 389 is in, regardless of whether we leave it in the minutes as to the fifth count or not. I don't know if I make myself very clear. But, however, we need not quibble about it.

Mr. Kiendl: I did not intend to quibble, your Honor.

The Court: No.

Mr. Kiendl: I just wanted to point out that I think the record will be incomplete if there is an exhibit that was not received by the Court's ruling in the record.

The Court: All right, then. Well, haven't there been many other instances where we struck out the actual minutes of what was said when an exhibit was received, despite the fact that the defendants' motion to strike at the end of the Government's case was denied? 389 is in regardless of whether we keep in specifically what the Court said: "389 is received without objection by defendant Klein, the objection of the remaining defendants thereto being sustained."

Mr. Kiendl: As long as your Honor is satisfied. [6932] I am.

The Court: No, I want to preserve an accurate record. But, I mean, if I were to accept your suggestion now it would occur to me that we would have to go back to the beginning and go over this entire record wherever we struck out pages of testimony that included a specific receipt of a document which, after the Governments' case, the de-

fendants moved to strike and that motion was denied. I see no difference between all those other situations and the one you point to now.

Mr. Kiendl: I don't either.

Mr. Bauman: I have understood the effect of your Honor's ruling to be as we have gone along that the record is in effect preserved by that your Honor's granting of these motions or deletion of this colloquy just prevents counsel from reading or talking about it in the future conduct of the trial. But I haven't understood that it does not exist for the purpose of the record.

The Court: I can't for the life of me consider anything that counsel might want to discuss with respect to the Court actually receiving a document in evidence, because the motion to strike [6933] subsequently reoriented the document completely; in most of these instances I granted your motion to receive it, i.e., anything occurring prior to June 1st, 1946, as against the defendant as to whom I excluded it in the first part. So as well as we understand each other I would prefer to go along the way we have.

Mr. Kiendl: All right.

The Court: So that to recapitulate, then, the exclusion of the colloquy is intended to commence after the answer to the fourth question on page 4938 and to continue down to the first question on page 4939, and then there will be an exclusion after the third question on page 4940, continuing down to the second question on page 4941.

The next exclusion will occur after the answer to the first question on page 4942, continue for the balance of that page and down to the first question on page 4943. The exclusion will also include the colloquy on page 4944 following the sixth question on that page down to the seventh question on that page.

[6934] There will also be an exception on page 4945 following the answer to the fourth question on that page.

The next exclusion will be on page 4947——

Oh, incidentally, that one on page 4945 ends at the bottom of the page.

The next exclusion then will be on page 4947 following the witness' second answer to the fourth question and ending at the bottom of page 4947.

The next exclusion will be the last line on page 4948 constituting the second sentence of the witness' answer to the last question on that page, continuing through all of page 4949 and continuing through all of page 4950 down to the recess.

Mr. Kiendl: Now, if your Honor please, the defendant Klein moves to strike from the cross-examination of the witness Rokoff by myself that portion beginning with the——

The Court: Well now, let me interrupt you for for a moment, Mr. Kiendl.

Mr. Kiendl: Sure.

The Court: You will recall that you originally moved to strike to the end of Rokoff's direct, but that was shortened by me to page 4950. Now do

you intentionally mean to make no motion with respect to the [6935] balance of Rokoff's direct from page 4951 to the end of his direct on page 4955?

Mr. Kiendl: No, we move to strike that out, if your Honor please, on the general ground that it is not germane to the fifth count of the indictment.

Mr. Bauman: The Government opposes that on the ground that it is germane to the fifth count of the indictment, and furthermore it goes to the interest of the witness William Rokoff.

The Court: Motion is granted. Pages 4951 through the end of the Rokoff direct on 4955 are striken.

There will be a short recess.

(Short recess.)

Mr. Kiendl: The defendant Klein moves to strike out from the cross-examination that I conducted that part beginning with page 4971, the first question, and continuing to page 4974, the answer to the fifth question.

Mr. Bauman: Your Honor, the Government has certain applications with respect to the pages between the commencement of the cross-examination on 4955 and the commencement of Mr. Kiendl's motion which goes to 4971. The Government moves to strike page 4956, starting at the sixth question and ending in this [6936] particular phase at the bottom of 4957.

Mr. Kiendl: Bottom of 4957?

Mr. Bauman: Actually the termination of that question and answer going over to 4958—ending on 4958 with "I am sorry, I don't remember that."

I am talking about an area, sir, where Mr. Rokoff after having said that he has continued as the office manager of H. Harvey & Company from July of 1945, down to date. He then goes on to testify at page 4957 that the business of H. Harvey & Company came to an abrupt end in March of 1948, at the time of the issuance of a jeopardy assessment in the amount of upwards of a million dollars.

Mr. Kiendl: The defendant Klein certainly opposes that application to strike.

Mr. Bauman: And that testimony, sir, I believe terminates on page 4958 with the answer to the first question on that page.

Mr. Kiendl: Is that all, Mr. Bauman?

Mr. Bauman: Well, that is as to that area. Then there are other areas.

Mr. Kiendl: And may the record show that the defendant Klein opposes that application.

Mr. Bauman: Shall I continue sir?

[6937] The Court: Just a moment.

The Government's application is denied.

Mr. Bauman: Now as to the second and the third question on that page 4958 I have no objection. However, commencing with the fourth question on 4958 and the questions to the bottom of that page, sir, they dealing with Kirby and Kirby, all reference

to which has been excluded, the Government moves that this portion of the testimony be excluded.

Mr. Kiendl: We consent to that, your Honor.

The Court: The Government's motion to strike the cross-examination of Rokoff on page 4958 commencing with the fourth question and concluding with the first question on page 4959 is granted.

Mr. Bauman: No, sir, commencing with the first question on page 4959——

The Court: Oh, excuse me. I didn't mean to include the entire of that question. I see that——

Mr. Kiendl: Just the first line.

The Court: Will you read my last statement.

(Record read.)

[6938] The Court: Change that: concluding at the bottom of the page is granted.

(Record read as follows: "The Government's motion to strike the cross-examination of Rokoff on page 4958 commencing with the fourth question and concluding at the bottom of the page is granted.")

Mr. Bauman: Now the next testimony, your Honor, continues with the first question on page 4959 to but not including the first question on 4967 which is concerned primarily with the laying of the foundation for the jeopardy assessments which remain in evidence.

Mr. Kiendl: That application the defendant Klein opposes.

The Court: To what page? 4967?

Mr. Bauman: Yes, sir. To the first question asked by Mr. Kiendl on that page, and the bottom of that page.

The Court: The Government's motion to strike Rokoff's cross-examination commencing with the fourth question on page 4958?——

Mr. Kiendl: You struck that out before, your Honor.

Mr. Bauman: I think your Honor ruled that [6939] out.

The Court: Oh, excuse me. It commences——

Mr. Donohue: The first question on 4959.

The Court: The first question on 4959, I beg your pardon, and terminating at the first question on 4967 is denied. However, there will be excluded the following colloquy: That appearing on page 4959 after the answer to the second question; all of page 4960; all of page 4961 down to the first question; all of page 4962 down to the first question, and the last line on page 4962; all of page 4963; all of page 4964 down to the first question, and the balance of the page after the answer to the third question; all of page 4965 down to the first question; all of page 4966, and all of page 4967 down to the first question.

Do you have any more?

Mr. Bauman: I do have just one or two more.

The Court: All right.

Mr. Bauman: Starting with the first question on page 4967 through the last question on 4968.

Mr. Kiendl: Defendant Klein opposes [6940] that application, with the exception of the colloquy.

Mr. Bauman: I will move separately with respect to the colloquy.

The Court: Would you read back Mr. Bauman's statement, please.

(Record read.)

Mr. Bauman: May I change that to "to the last question on page 4968."

The Court: Denied.

Mr. Bauman: Now, sir, starting on page 4968 with what purports to be the question, "So far as you know", which is the last question on 4968, to the first question on page 4971.

Mr. Kiendl: That is entirely colloquy, isn't it?

The Court: Yes. Granted.

Mr. Kiendl: We have no objection to that, provided all colloquy is out entirely.

The Court: Well, we have been striking it all, so far as I know.

Mr. Kiendl: That is all right.

The Court: All right. That motion is granted, and the colloquy commencing with the unanswered fifth question on page 4968 down to the [6941] first question on page 4971 is stricken.

Mr. Bauman: Now, I believe Mr. Kiendl's motion addressed itself to 4971 to 4972.

Mr. Kiendl: 4974.

Mr. Bauman: 4974.

Mr. Kiendl: To the fifth question on 4974.

Mr. Bauman: I have no objection to that, your Honor.

The Court: Granted.

Mr. Kiendl: Defendant Klein moves to strike the cross-examination of the witness Rokoff by me, that part beginning with the first question on page 4976 and continuing to the last line of page 4977, on the ground that that evidence is no longer germane to the only remaining count of the indictment.

The Court: Beginning with the first question on page 4976 and ending where?

Mr. Kiendl: The last line, before the last line on page 4977.

The Court: That is an unanswered question.

Mr. Kiendl: To the fifth line from the bottom, the beginning of the question unanswered.

Mr. Bauman: What was Mr. Kiendl's last [6942] statement?

(Record read.)

Mr. Kiendl: 4977.

Mr. Bauman: Your Honor, I have no objection to that, but may I suggest that your Honor consider the deletion of that colloquy following the first question on 4975 and continuing to the point Mr. Kiendl suggested.

The Court: As I understand it, the prior ruling encompassed that portion ending with the answer to the fifth question on page 4974.

Mr. Bauman: That is correct.

The Court: Therefore I take it that the remaining questions and answers on page 4974 and the first question and answer on page 4975 are to remain in the record.

Mr. Bauman: Right.

The Court: All right. The colloquy commencing after the answer to the first question on page 4975—we will have to backtrack, gentlemen; I have lost track of the continuity here because of the portions that have been skipped.

I will have to go back to page 4968. Now as I examine my notes here, one unit that remained [6943] in was the testimony commencing with the last question on page 4967 and terminating with the answer to the fourth question on page 4968. Is that correct?

Mr. Kiendl: That is right.

The Court: All right. Now then starting at that point on page 4968 to page 4971 I believe was stricken, is that correct?

Mr. Tyler: Yes.

The Court: Now we are on page 4971. Did that portion conclude the portion that was stricken?

Mr Bender: No, sir.

Mr. Bauman: It concluded with the asking of the first question on page 4971, your Honor.

[6944] The Court: Now commencing with the first question on page 4971 there was excluded all of the testimony down to the answer to the fifth question on page 4974, is that correct?

Mr. Bender: That is correct.

Mr. Kiendl: That is correct.

The Court: Thank you, gentlemen.

And now we pick up with the sixth question on page 4974, the balance of that page, and the first question and answer on 4975 remained in, because no motion was addressed to them, all of page 4975 after the answer to the first question and down to the first question on page 4976, the colloquy is stricken.

Now we pick up with the first question on 4976.

Mr. Kiendl: We move to strike out beginning there and continuing to the last question on page 4977.

The Court: And that is the portion to which you have no objection, is that correct?

Mr. Bauman: That's right.

The Court: Motion is granted.

Mr. Kiendl: Then we skip from there, if your Honor please, to page 4994 for the reason that——

The Court: Is all of the intervening [6945] colloquy?

Mr. Kiendl: All of it colloquy, I think.

The Court: Then it will be stricken.

That portion of the minutes commencing with the last question on page 4977 and down to the end of page 4993 is stricken.

Mr. Kiendl: The defendant Klein now moves to strike out from Rokoff's cross-examination that portion of my cross-examination beginning at the top of page 4994 and continuing down to the next to the last question and answer on page 5033 on the

ground that that evidence is no longer germane to any issue in the case.

The Court: Any comment, Mr. Bauman?

Mr. Bauman: I am just thumbing through it, your Honor.

(After a pause.) I have no specific comment.

The Court: Motion is granted. Testimony, cross-examination of Rokoff and colloquy contained in the stenographers' minutes commencing with the first question on page 4994 and terminating with the answer to the fifth question on page 5034 is stricken.

Mr. Kiendl: We now skip, if your Honor please, the page 5078. There may be some colloquy [6946] in between. I will check. We have no motion to strike in between except if there is some colloquy.

There is a little on page 5039.

Does your Honor want me to specifically point out where there is colloquy?

The Court: No, but I would like to know just where you are starting on 5078 so that that will give me the terminal point of this intervening section and I will come to it.

Mr. Kiendl: Right in the middle of the page after the answer—that is, down through the third question and answer and begin with the fourth question.

The Court: All right.

Now I will run through the area of Rokoff's cross commencing with the sixth question on 5033 and terminating with the answer to the third question on 5078.

Mr. Kiendl: That is right.

The Court: And I take it the defendant Klein makes no motion with respect thereto?

Mr. Kiendl: That's right.

Mr. Bauman: May I have just a moment to look at that testimony, sir?

The Court: Yes,

[6947] Mr. Bauman: I move to strike starting on page 5045 with my own remarks and terminating with the first question on 5049.

The Court: As to that there will be excluded the last two lines on page 5044, following the last question on that page, and the first two lines on page 5045.

There will also be excluded the colloquy commencing after the answer to the second question on page 5045, all of page 5046.

There will also be excluded colloquy on 5047 as follows. Following the answer to the first question on that page down to the second question on that page. Following the answer to the third question on that page through the balance of the page.

There will also be excluded the entire of 5048 and 5049 down to the first question.

Mr. Bender: We are all missing 5048.

The Court: Well, I was missing it too, gentlemen, but I sent down and got it.

Mr. Kiendl: I think we had it too.

The Court: Well, I will read it to you. This need not go in the record, I assume.

(Off the record.)

[6948] The Court: (After reading 5048) And I have continued to exclude that colloquy down to the first question on page 5049.

Mr. Bender: Thank you, your Honor.

Mr. Bauman: Now where did you intend to start, Mr. Kiendl?

Mr. Kiendl: 5078.

The Court: There will be excluded all of page 5033 and down to the first question on page 5054. Starting with the second line and down to the second question on page 5056. Starting after the first answer on 5059 down to the first question on 5059.

I take it that there is no testimony in this portion of the Rokoff cross that addresses itself to any exhibits heretofore stricken?

Mr. Kiendl: I don't think so, your Honor.

Mr. Bauman: There is—I believe there is some with relation to 372 and 376.

[6949] The Court: All right. Except as heretofore indicated there will remain in the record the Rokoff cross commencing with the answer to the fifth question on page 5033 and concluding with the answer to the third question on page 5078.

Mr. Bauman: Would your Honor be good enough to look at the last question on page 5044 and the first question on 5055?

The Court: The last question on 5044 and the first question on the next page?

Mr. Bauman: Yes, and the answers thereto.

The Court: Well, of course you are addressing

yourself to the fact that Government's 376 was stricken; is that it?

Mr. Bauman: Yes.

Mr. Kiendl: The defendant Klein opposes that application.

The Court: Well, it makes little difference, because even if I were to strike out that question and answer because the exhibit is out, the next question in which he reads from the exhibit into the record would remain in. So I think it is——

Mr. Kiendl: That is all right.

The Court: There is no purpose in striking [6950] it out.

Mr. Kiendl: None at all.

The Court: No. Is that your only comment, Mr. Bauman?

Mr. Bauman: Yes, your Honor.

The Court: Now then will you pick up at 5078, please, Mr. Kiendl?

Mr. Kiendl: The defendant Klein moves to strike the witness Rokoff's testimony on cross-examination by me beginning with the fourth question on page 5078 and continuing to the bottom of page 5080, on the ground that that material refers to matters testified to on his direct examination that have been stricken from the record?

The Court: Granted.

Mr. Kiendl: We now move to strike the cross-examination of Mr. Rokoff beginning on page 5081, the first question on the page, and continuing to the third question on page 5086, on the ground that

that evidence is no longer germane to any issues in this case; it refers to matters most of which have been stricken out on his direct examination.

Mr. Bauman: I have no specific request.

The Court: The motion is granted.

[6951] Mr. Kiendl: That is all we move to strike from our cross-examination of the witness Rokoff, your Honor.

Mr. Bender: Was the last one through and including the third question and answer or up to the third?

The Court: I understood it to be mainly through the answer to the question.

Mr. Kiendl: Right, your Honor, 5086.

Mr. Bauman: Your Honor,——

The Court: Just a moment, please. Would you read Mr. Kiendl's statement back to me.

(Record read as follows:

"Mr. Kiendl: That is all we move to strike from our cross-examination of the witness Rokoff, your Honor.")

Mr. Kiendl: That is confined to the cross-examination.—There may be something in the recross that we will come to later.

The Court: Your cross-examination ended on 5096.

Mr. Kiendl: That is right, your Honor.

The Court: And when you say, "our" I understand you to mean the defendant Klein's cross.

[6952] Mr. Kiendl: Correct, sir.

The Court: Now do you have any motion with respect to the cross-examination of Rokoff by any other defendant.

Mr. Kiendl: No, your Honor.

The Court: So I take it that you make no motion with respect to the cross-examination, the balance of the cross-examination of the defendant Rokoff which——

Mr. Kiendl: Mr. Donohue's begins at 5096.

The Court: Yes, I know that, but I am trying to find out the end of all cross-examination, and it would appear to me be to be——

Mr. Kiendl: I think Mr. Greenman's ends at the top of 5120.

The Court: Yes, it would appear to me to be at 5120.

Mr. Kiendl: We have some motions with respect to redirect examination.

The Court: Well, we have to dispose of this area between 5086 and 5143 which is where the redirect commenced.

Now of that total area, from 5086 commencing with the third question down to the answer to the first question on 5120, constituted actual cross-examination, [6953] after the answer to the first question on 5120 and to the first question on 5143 constituted colloquy, so we will have to dispose of those two areas first.

Now I take it that no motion is made by the defendant Klein with respect to the cross-examination of Rokoff commencing with the third question on page 5086 down to the answer to the first question on 5120.

Mr. Kiendl: Correct.

The Court: All right. We will ask the Government if they have any comment as to that.

Mr. Bauman: As to the cross-examination by the defendant Klein which terminates at 5096, I have completed glancing at that and I have no objection to that material remaining in the record.

Will the Court bear with me for one moment?

The Court: All right. I will go through it page by page because certain colloquy will have to come out. In other words, we will omit that portion of the minutes commencing after the first answer on page 5087 through that entire page and including the first line, i.e., up to the first question on page 5088.

There will also be omitted colloquy appearing on page 5089 after the answer to the fourth question on that page and continuing the omission through all of [6954] page 5090 and all of page 5091.

Mr. Kiendl: Except the last line, I think, your Honor.

The Court: You are quite correct. Down to the first question on that page which is on the last line. There will also be omitted—and, incidentally, looking at the question commencing on the last line of page 5094 I have made a notation in my minutes that the figure on the sixth line, i.e., "year 1952" should be "year 1950." The parties consent to that

Mr. Bender: What page is that, your Honor?

The Court: 5095.

Mr. Bauman: The Government consents.

The Court: The second word, so to speak, of the sixth line.

Mr. Kiendl: It should be 1950

The Court: All right. Now then there will be omitted on that page 5095 colloquy appearing after the first answer thereon and continuing down to the first question on page 5096.

Mr. Donohue: May I have permission form the Court to move to strike my own cross-examination of the witness Rokoff as it begins on page 5096 up to the last question on page 5111, all which intervenes in [6955] the pages in between, because I think the examination bears solely on the issue of fact stated in the first four counts of the indictment.

The Court: Does the defendant Klein have any comment with respect to this motion, which of course runs contrary to Klein's intention of remaining silent with respect to this testimony?

Mr. Kiendl: We have no objection to it being stricken. We don't move to have it stricken.

The Court: All right.

Mr. Donohue: I would specifically move the Court now to retain in the record the balance of the cross-examination by myself of the witness Rokoff beginning with the last question on page 5111 and continuing to the end of the cross-examination on page 5116.

The Court: Well, for the moment we will deal with these motions to strike the Rokoff cross beginning with the first question on page 5096 and concluding with just before the first question on page 5111. Let us get that out of the way first.

Mr. Donohue: Very well, your Honor.

The Court: To which the defendant Klein consents.

Do you have any comment, Mr. Bauman?

Mr. Bauman: No, sir.

[6956] The Court: The motion is granted.

Now no motion is made with respect to the Rokoff cross commencing with the first question on page 5111. However, there is colloquy that will be excluded commencing with the second line of 5112 down to the first question on 5113.

There will be a further exclusion of the colloquy commencing after the answer to the third question on page 5116 and down to—I should say through the entire of page 5117 and to the first question on page 5118.

There will also be excluded the colloquy after the answer to the third question on page 5118 down to the fourth question on that page and that appearing on that page after the answer to the fourth question and for the balance of the page, which exclusion will continue for all of page 5119 to the bottom of that page.

There will also be excluded everything appearing after the answer to the first question on page 5120; and then all of the record commencing with 5121 to the bottom of page 5142. I believe you will find, gentlemen, that all of that is colloquy and had nothing to do with testimony.

[6957] Mr. Kiendl: 5142?

The Court: Rokoff's redirect started on 5143, the top of the page.

* * *

Afternoon Session, 2:15 P. M.

[6965] Mr. Kiendl: If your Honor please, I think we have reached the redirect examination of Mr. Rokoff on page 5143.

The Court: Yes, sir.

Mr. Kiendl: And the defendant Klein now moves to strike out from that redirect examination that portion beginning on page 5143, the first question and answer, and continuing down to and including the third question and answer on page 5154; that all has relation, as I hastily glance through it, to the Cuban books of these various companies, and we submit it is not germane any longer to any issue in this case.

Mr. Bauman: With relation to that, your Honor, the Government objects to that portion of the motion to strike which starts with the last question on the bottom of the page 5145 and which terminates with the answer to the third question on 5154. May I just say——

The Court: Let me interrupt to ask you if you would give me that portion again.

Mr. Bauman: It starts with the very last line on page 5145.

The Court: Yes.

[6966] Mr. Bauman: And ends I think the same place as Mr. Kiendl's.

Mr. Kiendl: The end of the third question and answer on 5154.

Mr. Bauman: Yes.

The Court: I see.

Mr. Bauman: I have in mind that most of the testimony which the Government wishes retained bears upon a statement made by the co-conspirator William Rokoff wherein he admits making a statement which is at direct variance with his testimony at the trial during the period of the conspiracy to agents of the Internal Revenue Service, wherein he said, in effect, when interrogated in 1952 my recollection is, on August 26, 1952, "I never saw the books, I saw a result of the record such as bank statements, profit and loss statements, trial balances et cetrea," and that appears more specifically, the interrogation with relation to those questions and answers starts on page 5146 wherein I asked Mr. Rokoff wherein he responded to Mr. McCarthy in that way. I would suggest so that the jury could draw the inference if they found at the time he made that answer to McCarthy he deliberately lied about having seen the books, that it would be an act in furtherance of the [6967] conspiracy charged in the fifth count.

Mr. Kiendl: We oppose the application on the ground that it has no probative value whatever so far as the fifth count is concerned.

Mr. Bender: Defendant Haas joins in that application, your Honor.

Mr. Donohue: As does the defendant Alprin, your Honor.

The Court: The defendants' motion to strike the Rokoff redirect examination commencing with the first question on page 5143 and terminating with

the answer to the third question on page 5154 is granted.

Mr. Kiendl: Defendant Klein now moves to strike beginning with the fourth question on that same page, 5154, and continuing through the last question and answer on page 5158 on the same ground.

The Court: Granted.

Mr. Kiendl: Defendant Klein now moves to strike from the redirect examination of the witness Rokoff that portion beginning with the first question at the top of page 5159 and continuing down to the last question on page 5160, all about balancing books, as no probative value so far as the fifth count is concerned.

Mr. Bauman: Your Honor, the Government objects [6968] to that on the ground that the cross-examination which is the subject matter of that re-direct examination remains in the record.

The Court: Defendant Klein's motion to strike that portion of the Rokoff redirect as appears on page 5159 through the answer to the fifth question on 5160 is denied.

Mr. Kiendl: Defendant Klein now moves to strike beginning with the last question on page 5160 and continuing through page 5164, the first answer on that page, all concerning rewriting of the Regan Potter books, on the ground that that is not germane to the issues involved in the fifth count in the indictment.

Mr. Bauman: The Government opposes.

The Court: Denied.

Mr. Bender: Defendant Haas will join in the motion, your Honor.

The Court: Denied.

Mr. Kiendl: Defendant Klein now moves to strike beginning with the first question on page 5164 and continuing through the first question and answer at the top of page 5166, all regarding the $3,000,000 checks on the same ground that the defendant Klein moved to strike out similar testimony on the direct [6969] examination.

Mr. Bauman: The Government opposes, your Honor.

The Court: What answer on page 5166, please?

Mr. Kiendl: The first question and answer, the second answer on the page.

The Court: Denied.

Mr. Bender: Defendant Haas will join in the application, your Honor.

The Court: Denied.

Mr. Kiendl: Defendant Klein now moves to strike out beginning with the second question on page 5166 and continuing down to page 5168, the last line, on the ground that that evidence is not germane to any issue remaining in the case.

Mr. Bauman: I have no specific parts of that testimony to call to the Court's attention.

The Court: Granted.

[6970] Mr. Kiendl: The defendant Klein now moves to strike out in the redirect examination of

the witness Rokoff that part beginning with the first question on page 5169, continuing down to page 5184, on the ground that that primarily involved inter-corporate transactions that are no longer involved in the issues of the fifth count.

Mr. Bauman: The Government opposes starting with the first question on page 5169 and terminating with the first answer on the top of 5170, your Honor.

How far does that go, Mr. Kiendl?

Mr. Kiendl: 5184.

Mr. Bauman: That is the only part that I wish to call to the Court's attention.

The Court: Down to where on 5170?

Mr. Bauman: Just the answer, your Honor, at the top of the page.

Mr. Kiendl: And I have no objection to the inclusion of that, your Honor.

The Court: Defendant Klein's motion to strike from Rokoff's direct on page 5169 commencing with the first question on said page through the answer to the fifth question on page 5183 is granted [6971] except on page 5169 commencing with the first question and taking in the balance of that page up to and including the first answer on page 5170.

Mr. Kiendl: Now there is colloquy on 5184 and 5185.

The Court: Yes.

Mr. Kiendl: We now move to strike beginning at the top of page 5186 to 5190 on the ground that it all relates to material that is no longer of any

evidentiary value so far as the remaining count of the indictment is concerned.

The Court: Down at the bottom of 5190?

Mr. Kiendl: Just one second, your Honor.

Down to the question and answer at the top of the page—down through the first question and answer.

The Court: On what page?

Mr. Kiendl: 5190.

The Court: Did you say "to" or "through"?

Mr. Kiendl: Through.

The Court: Through.

Mr. Kiendl: Including the first question and the first answer.

Mr. Bauman: No objection.

[6972] The Court: Granted.

Mr. Kiendl: We do not move to strike out 5190 to 5192. And that concludes I think the redirect examination.

In recross examination we have no motion to strike out any part of that.

Mr. Bauman: I wonder if before we get to the recross examination, your Honor, I might address a word or two by way of argument with relation to the statement of Rokoff to the Internal Revenue Service with regard to which your Honor has granted the motion to strike. Would your Honor hear further argument on that?

The Court: Yes, I will.

Mr. Bauman: I just want to make clear that the fact that the basis upon which the Government

asks your Honor to retain that testimony in the record is because William Rokoff is named as a co-conspirator; that in making the answers that he made the jury could find, one, that he was lying at the time because he has testified there to the effect that he had seen the books; and, two, that he was lying in pursuance of the conspiracy set forth in the fifth count; that as such his statement to McCarthy in 1952 is an [6973] act in furtherance and in direct furtherance of the fifth count conspiracy.

The Court: I understood that to be your argument and I don't agree with it, so I am indisposed to change the ruling.

Now that brings us to Rokoff's recross.

Mr. Kiendl: We have no motion in respect to that.

Mr. Bauman: May I glance at that, your Honor?

The Court: Surely. It starts I believe at——

Mr. Bender: 5196.

The Court: —5196.

Mr. Bauman: Now with relation to 5196 and 5197 starting with the recross examination and continuing throughout page 5197 through the first question and answer on 5198.

Mr. Kiendl: We have no objection to that going out if the Government wants it out.

The Court: All right, Government's motion to strike is granted and there will be stricken from the Rokoff recross the testimony commencing at the first question on page 5196 and terminating with

the [6974] answer to the first question on page 5198.

Mr. Bauman: I have no further motions addressed to recross, your Honor.

The Court: All right, that brings us to the Bennett testimony on page 5209.

Mr. Kiendl: The defendant Klein moves to strike that out in its entirety on the dual ground that the purported entry in the books of Regan Potter to which the witness has testified was entered after Mr. Klein had sold out and had no further interest in Regan Potter; and on the further ground that in any event the item does not tend to establish the existence of the conspiracy alleged in the fifth count of the indictment.

Mr. Bauman: The Government objects of course and urges the retention of the entire testimony, direct and cross, of Renee Bennett as bearing directly on the fifth count and the participation of the defendant Haas in connection with the fifth count.

Mr. Bender: May I be heard, your Honor?

I join in the motion made by Mr. Kiendl for the reasons that he mentioned and for these following reasons:

I think at the time that the [6975] Government offered the testimony of Miss Bennett it was specifically offered in connection with a pending motion that your Honor had with regard to the exclusion of some evidence as to the million and a half dollars and once that evidence was excluded there was abso-

lutely no probative value for her testimony with regard to anything in the fifth count.

Now I would further move to strike it out on this basis: That the million and a half dollar entry, even assuming now that Mr. Haas did instruct her to make that entry, has nothing whatever to do with the entry of the million and a half dollars on the books of Tivoli and the corresponding entry on Regan Potter as to a loan because this entry that this woman testified to was an April entry which referred to a commission being paid of a million and a half, not alone receivable. Now there has been no testimony whatsoever as to the nature of that entry other than what is reflected in the book. There has been no testimony that it is an incorrect entry. There has been no testimony that that entry in any way conceals anything as far as determining the taxable nature or the taxable liability of H. H. Klein or any of the defendants here. [6975a] And as such it is suspicious, it leaves a suspicious attitude in the mind of the jury.

[6976] Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

The Court: Motions denied.

That brings us to Valverde.

Mr. Kiendl: Defendant Klein moves to strike the entire testimony of the witness Valverde on the ground that it is not germane to any issue remaining under the fifth count of this indictment.

Mr. Bender: Defendant Haas joins in that motion.

Mr. Kiendl: May we add that it is not in anywise binding on the defendant Klein.

Mr. Bender: I accept that as far as Haas is concerned, too, your Honor.

Mr. Bauman: And the Government opposes the granting of those motions, sir.

Mr. Donohue: Defendant Alprin has no motion with respect to the testimony of the witness Valverde, your Honor.

The Court: Motion to strike the testimony of Alberto Valverde on pages 5230 to 5266 is denied.

* * *

Mr. Kiendl: Defendant Klein moves to strike out from the statement of the Klein interview with Special [6977] Agents Victory and McCarthy on November 26, 1952, that part beginning with page 5271 and continuing down to the words "By Special Agent Victory" in the middle of page 5278; that all refers to matters that have now been finally adjudicated adversely to the Government on the motion for judgment of acquittal.

Mr. Bauman: The Government opposes, your Honor, with relation to those pages and would suggest that the entire statement of the defendant Klein is admissible, one, on the ground that it is proper background and this time indeed more than background, a representation of the fact that this is what happened in his conference, in his interrogation by the Internal Revenue Service, and it would bear on the nature of his relationship with three of the other named defendants at page 5273 who are like-

wise indicted in this case and charged with conspiracy under the fifth count. In other words, your Honor, it traces in the defendant's own words his own relationship with the various parts which the Government claims culminated in the making of the fifth count conspiracy and for that reason is properly in the record.

Furthermore, I would argue that the jury has the right to have before it the entire statement of the [6978] defendant Klein to arrive at a conclusion as to whether in making this statement, the entire statement, he was attempting to throw sand in the Government's eyes in furtherance of the conspiracy set forth in the fifth count.

Mr. Bender: Defendant Haas will join in the motion made by the defendant Klein and on the further ground that it is not binding as to the defendant Haas.

Mr. Donohue: Defendant Alprin joins in the motion to strike made by counsel for the defendant Klein.

The Court: In my view, to the extent that anything would be admissible as background, and I am addressing myself to the testimony of the defendant—well, frankly, it is not testimony of the defendant Klein, it would be the reading of the minutes of an unknown witness who took those minutes at the time of the hearing, the past recollection recorded of the reporter; but to the extent that any of that might be admissible as background material, and I am bringing myself on page 5270 where the reading

commenced to the answer to the second question on page 5278, to the extent that any of that might be admissible as background material it has been amply covered by other stuff that has been allowed in. I see absolutely [6979] no basis for continuing it in the record. In my view, it is quite remote to the fifth count, and in any event to whatever limited extent it may be applicable thereto, the dealings of the parties are otherwise disclosed in what is left in the record.

The motion to strike that portion of the minutes is granted.

Mr. Bender: Down to what question and answer?

The Court: Down to the answer to the second question on page 5278.

Mr. Bender: Thank you, your Honor.

Mr. Kiendl: Defendant Klein now moves to strike from the Klein statement that part beginning with the third question and answer on page 5278 and continuing down to the words "By Special Agent Victory," on page 5286 on the same ground.

Mr. Bender: Defendant Haas will join in that motion, your Honor, and on the further ground that it is not binding as to him.

Mr. Donohue: Defendant Alprin joins in the motion made by counsel for the defendant Haas.

Mr. Bauman: The Government opposes.

The Court: Defendants' motions to strike the testimony of the reporter with respect to the Klein [6980] statement and contained on pages 5278 to 5286, commencing with the third question on page

5278 and terminating with the answer to the second question on page 5286, are granted.

Mr. Kiendl: Defendant Klein now moves to strike out from the same testimony that portion beginning at page 5288 at the third question and continuing down to the words "By Special Agent McCarthy" on page 5292 on the same ground.

Mr. Bender: Defendant Haas will join in that motion, your Honor, on the same ground, and for the further reason that it is not binding as to the defendant Haas.

Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

Mr. Bauman: The Government objects, your Honor, upon the ground that the jury can conclude that this was a step taken by the defendant Klein in furtherance of the conspiracy alleged in the fifth count.

The Court: Motion is granted.

Mr. Klein: Defendant Klein now moves to strike from that same testimony beginning with the word, "By Special Agent McCarthy," toward the bottom of page 5292 down to the bottom of page 5305, the words: [6981] "Mr. Bauman: And they adjourned for lunch at 1 p. m."

Mr. Bender: Defendant Haas will join in the motion made by Mr. Kiendl on the same ground, and on the further ground that it is not binding as to the defendant Haas.

Mr. Donohue: Defendant Alprin joins in the motion to strike, your Honor.

Mr. Bauman: I have certain specific areas I should like to call to the Court's attention. The last question and answer on page 5294.

The Court: I would make no exception to that if I were to grant the motion.

Mr. Bauman: On page 5296, your Honor, the question starting under "By Special Agent Victory," and ending with the last answer on that page.

The Court: Well, are you speaking of the third question and answer thereto on page 5296?

Mr. Bauman: Yes.

The Court: Well, it is not an answer.

Mr. Bauman: Well, that is the answer he gave the revenue service. It seems to me that it is a question the jury might very well conclude was a deliberately evasive answer.

The Court: No, I won't make an exception on [6982] that.

Mr. Bauman: May I call the Court's attention to page 5297, starting with the first question on that page, and continuing through the second question and answer on page 5298, and I would say in that connection that these are submitted upon the ground that the jury can reasonably conclude that these answers were made pursuant to the fifth-count conspiracy. I was fumbling for a moment, because I was trying to think of another expression for "throwing sand in the Government's eyes."

The Court: Well, throwing dust in the Government's eyes.

Mr. Bauman: Well, what I started to say was that the jury could conclude from the record in this case that these answers were made to a representative of the Revenue Service to impede the Revenue Service in the collection of its revenues.

The Court: I disagree with you. I won't make an exception. To impede them in determining the source and nature of his income and the nature of his business is so remote as to be completely in a haze. Whether he made allocations or R. C. Williams made allocations, what connection that might have with the fifth count is completely beyond me, Mr. Bauman.

[6983] Mr. Bauman: Well, what I am——

The Court: I mean, I am merely giving you my opinion as to the basis upon which I am rejecting this.

Mr. Bauman: Right.

On page 5035, starting with the first question on that page and ending with the last answer on that page and that, sir, by way of an admission.

The Court: The defendants' motion to strike that portion of the reporter's testimony as cover the statement of the defendant Klein contained in the minutes of this trial commencing with the fourth question on page 5292 and terminating with the answer to the seventh question on page 5305 is granted, except the portion commencing with the first question on page 5305 and terminating with the answer to the seventh question on page 5305.

We will take a fifteen-minutes recess, gentlemen.

(Short recess.)

[6984] Mr. Kiendl: If your Honor please, the defendant Klein does not move to strike out any of the testimony given by the reporter of Mr. Klein's statement from page 5309 to 5355. Defendant Klein, however, does move to strike out that portion of the testimony beginning with the first question on page 5355 and continuing down to the bottom of page 5365 up to the last question on that page.

The Court: We will address ourselves first to that portion of the testimony of the reporter that reflects the Klein statement on the stenographer's minutes of this trial commencing with the first question on page 5309 and terminating with the last question, or rather the answer to the last question on page 5354. That is correct, is it not? Your motion to strike addresses itself to that portion commencing at 5355?

Mr. Kiendl: That is right.

The Court: Now addressing ourselves to the portion just identified to which the defendant Klein makes no motion I now inquire whether any other defendant or the Government offers a motion respecting that portion?

Mr. Donohue: The defendant Alprin makes [6985] no motion, your Honor.

Mr. Bender: The defendant Haas, your Honor, moves to strike that portion of the testimony beginning at page 5309 down to the answer to the

third question on page 5323 on the ground it is not binding as to the defendant Haas.

The Court: Denied.

Mr. Bauman: I have no motions to address to that portion.

The Court: All right, then we will consider now the motion by the defendant Klein to strike the testimony commencing with the first question on page 5355 and terminating with the answer to the third question on page 5365.

Mr. Donohue: May the defendant Alprin join the motion to strike 5355 to 5365?

Mr. Bauman: Government opposes as regards pages 5355 through 5357.

Also the last question and answer on page 5360, your Honor.

The Court: Last question and answer on what page, please?

Mr. Bauman: 5360, your Honor.

On page 5362, your Honor, starting with the [6986] second question on that page, the second and third questions and answers on that page.

That is all within that area.

The Court: Has the defendant Haas stated his position with respect to this area?

Mr. Bender: Not yet, your Honor.

With the exception of the second question and the answer thereto and the third question and the answer thereto on page 5355 which we would like to except from Mr. Kiendl's motion to strike be-

ginning from the first question on 5355 to the last question on 5365, and with regard to the rest of it we join in the motion to strike.

The Court: Well, the various motions are resolved in this manner: The testimony of the reporter indicating the statement of Klein as contained in the minutes of this trial commencing with the first question on page 5355 and terminating with the answer to the third question on page 5365 is stricken on defendants' motions except all of pages 5355, all of page 5356, and all of page 5357.

Mr. Kiendl: The defendant Klein now moves to strike from that same testimony that portion beginning at the bottom of 5365, the last question on the page, [6987] and continuing through to the last sentence on page 5370 on the same ground.

Mr. Bender: The same motion, your Honor.

Mr. Donohue: The defendant Alprin has no motion, your Honor.

Mr. Bauman: The Government opposes.

The Court: Granted.

Mr. Kiendl: Will your Honor give me just a minute?

The Court: Surely.

Mr. Kiendl: The defendant Klein now moves, if your Honor please, in connection with that same testimony to strike that portion beginning with the top of page 5371 to the end of his testimony on page 5382, the first answer on that page, all on the same ground it is not material to any issue that remains in the case.

[6988] Mr. Bender: Defendant Haas will join in the motion, your Honor.

Mr. Donohue: The defendant Alprin joins in the motion to strike also, your Honor.

Mr. Bauman: The Government opposes that motion on the ground that the overwhelming portion of this testimony relates directly to the fifth count.

Mr. Donohue: I joined in the motion to strike, if it please your Honor.

The Court: The motions are denied.

* * *

[6993] New York, July 13, 1955,
10.30 o'clock a.m.

Trial resumed.

(The following proceedings were held in the absence of the jury):

The Court: Now, gentlemen, before we resume, I thought last night about the fact that I made a statement to you that I did not propose, because of the futility of it, at any time to turn to the jury and say that Exhibit So-and-So was stricken and Exhibit So-and-So was stricken, because that would be just so much gibberish so far as their understanding is concerned. On the other hand, we are confronted with this problem: When we are going through the process of striking testimony and exhibits we are doing it not just to consume time, we are doing it

because of the fact that these exhibits and that testimony that is stricken are not to be considered by the jury in determining the guilt or innocence on the fifth count. So it seemed obvious that the jury has to get at sometime before they go to [6994] their deliberations some instruction as to what is in and what is out.

We abandoned the original plan, and for good and sufficient reason, of giving them what I characterize as the dossiers of exhibits and testimony, but we have to evolve a substitute, and that brings into play in my view two considerations: the format of the substitute and the time when it is given.

Now it appears to me that reserving for my charge at the very end of the case instruction to the jury as to what is in and what is out would be not the best course. I feel that they should go to the defendants' case with an understanding, one, just what is left in the case, i.e., the fifth count, and, two, what is left in the Government's case to support its charge under the fifth count.

Now I thought about it very seriously and have come to this conclusion: to reserve that until the end of the case I feel might be a detriment to the defendants because I think the jury should have their (as much as they can) crystallized thought of what the Government's case is before it hears the defense, and that then would resolve itself into this technique —[6994a] that immediately upon the conclusion of the motions to strike the jury be told, in narrative form by the Court, in summary, what exhibits re-

main and very briefly what each exhibit is, to remind them, because, after all, they have been away from this case for quite a while, and also in brief summary what testimony remains.

Now it occurred to me that we might conclude our disposition of the motions to strike the remaining testimony by possibly early tomorrow. I have excluded the jury until 10.30 tomorrow morning. You understand that they are not coming in and we are not convening until 2.15 on Monday because of the morning exercises in connection with Judge Lumbard's induction.

And so I thought, if it is agreeable with you, and I do not want to make a direction because I realize that your convenience is involved, that if we concluded early tomorrow, as I have every hope we may, or even if we go through the full day I am sure we won't extend beyond that on these motions to strike, that representatives of the United States Attorney's office and of the defendants sit down on Friday, and Saturday if necessary, and prepare a summary to be handed to the Court on Monday to be read by the Court on Monday to [6995] the jury of the exhibits still in evidence and of the testimony not stricken. And I feel that from the Government's point of view and from the defendants' point of view that is the only fair way and the only fair time at which the jury should be advised as to what still remains in the case.

Now that is my thinking about it, and I would be very happy to hear expressions from you gentlemen as to how you feel about it.

Mr. Kiendl: If your Honor please, on behalf of the defendant Klein, I think the suggestion that the jury be advised as to what is now left in the case so far as the indictment is concerned and what evidence there is in the case to support that indictment is a perfectly sound and feasible one, and we are all in favor of your Honor telling the jury at the conclusion of these motions that certain evidence has been stricken and certain evidence remains.

But when your Honor suggests that we try to agree with the district attorney or the United States Attorney as to summarizing what evidence remains in the record, I am afraid we will——

The Court: May I make this suggestion? The only reason, Mr. Kiendl, that I would not undertake [6996] to do the entire chore myself is because I do not think that one man could do it between tomorrow night and Monday afternoon. I would be willing, and I don't think that you would have any difficulty in agreeing on a summarization of the exhibits——

Mr. Kiendl: None whatever.

The Court: All right. Then I will undertake to prepare a summary of the testimony as I see it, and then I will relieve you, the defense counsel and the Government counsel, from the undoubted bickering that would arise in characterizing certain testimony. I am prepared to do the summarization of testimony myself over the week-end if you will undertake to summarize the exhibits and to check and make sure that every exhibit that was not stricken was on the list.

Mr. Kiendl: I think that is very feasible and very practical and we are all for it.

The Court: What about it, Mr. Bauman?

Mr. Bauman: I don't see any reason why it can't be done, your Honor.

The Court: Fine.

* * *

[6997] I will select all of that that has not been stricken and summarize it as briefly as possible, and I will rely upon you gentlemen to summarize all of the exhibits.

[6998] Mr. Bender: Now is it your Honor's intention at that time to instruct the jury as to the import of the so-called background evidence?

The Court: In just a very general way—just explain to them that they must catalog in their minds that which appears to have occurred prior to June 1, 1946, and that which appears to have occurred afterwards, because at the time of my charge I will in greater detail charge them that the background material is received for the purpose of giving them an intelligent approach of what transpired before June 1, 1946, in order for them to determine whether a conspiracy arose thereafter and be content with that. I am not going to give them a charge. But I do feel that they should have a general understanding of what is left in the case before they undertake to hear the defense on the fifth count.

Do you agree, Mr. Donohue?

Mr. Donohue: I am in full accord, your Honor.

The Court: All right, then here is what will be done. I will undertake to summarize the testimony you need not concern yourselves about that. You gentlemen therefore are directed to have available [6999] for me by 2.15 on Monday, next Monday, a summary of each exhibit not stricken—and I don't think you should have any difficulty in being able to describe each of those exhibits without too much trouble.

* * *

[7000] Mr. Bauman: Now with relation to the statement of Hyman H. Klein to the Internal Revenue Service which commences in the record at page 5270, your Honor, and I think this point will come up in connection with some of the testimony your Honor has retained, this is somewhat typical.

The Court: 5270?

Mr. Bauman: Well, I am referring to the commencement of the statement at that page.

The Court: Oh, yes.

Mr. Bauman: Now as I understand it, the motions to strike included the material on 5270 which merely indicates when the statement was taken, where it was taken, the appearances at the taking of the statement indicating in this case for instance Mr. Klein was represented by two attorneys and the Government had two special agents, Mr. Green and Mr. Dart, present. And [7001] also the commencement of the statement including all of that on page 5171——

Mr. Kiendl: 5271.

Mr. Bauman: —5271 to and including all of that page and continuing on page 5273 to the first question and answer on page 5273. Now I have in mind that the jury is entitled to know that this statement was under oath. They are entitled to know when it was taken, where it was taken, and who was present at the time it was being taken.

The Court: You are right, Mr. Bauman, that was excluded—at least to this extent: That it was chopped off, the salutation or heading was chopped off right in the middle. My notes would indicate that the stricken portion began at page 5271. Now that would leave in the last eight lines on 5270, but that's only half of the story, because the remaining eight lines on page 5271 are just as much informative as to the circumstances under which the statement was taken as are the last eight lines on 5270.

Now then I take it that you are asking that there be excluded from the——

Mr. Bauman: That there be excepted——

The Court: —from the granting of the [7002] motion to strike the portion commencing with the 17th line on page 5270 down to and including the 15th line on page 5271, which would be the answer to the second question on that page.

Mr. Bauman: Well, actually, your Honor, I am asking for more than that. I am asking that it continue to page 5273, the first question and answer thereto. The reason I am doing that is that at page

5272, for instance, it is apparent that Mr. Klein was sworn at the time he gave these answers and warned of his constitutional rights, and I think that with relation to the remainder of the questions and answers starting at the middle of 5271 and continuing to the end of the first question on page 5273 is background information about Mr. Klein which the jury has a right to have and which can in no way prejudice him. It identifies him, in other words.

The Court: Do you wish to make any comment on that, Mr. Kiendl?

Mr. Kiendl: I will consent to it, your Honor. I don't see any harm in it at all.

The Court: All right. Then there will be excepted from the motion to strike—the granting of the motion to strike the testimony of the reporter [7003] giving the statement of the defendant Klein commencing on page 5270 at the beginning of the quotation with the word "Testimony" and continuing through all of 5271, all of 5272 down to the answer to the first question on 5273.

(Mr. Bauman nods.)

The Court: Now did the defendant Haas and Alprin wish to be heard on that? I don't want to exclude you.

Mr. Donohue: No, your Honor.

* * *

The Court:

That brings us now to Government's Exhibit 249, which is the statement of interview of Irving A. Koerner In the Matter of Income Tax Liability of Hyman Harvey [7004] Klein, et al, dated October 15, 1952, at which were present Koerner, Glassgold & Lewin, attorneys for Koerner, and Victory and McCarthy, special agents for the Bureau of Internal Revenue.

* * *

[7005] All right. Do the defendants make any motion with respect to Government's Exhibit 249?

Mr. Kiendl: Yes, if your Honor please, you will recall that the defendant Klein moved to strike out the entire exhibit and then it was held in abeyance to be taken up with these other statements. We now renew that motion to strike out the entire exhibit, 249, the statement of Mr. Koerner to the Income Tax Bureau on October 15, 1952.

[7006] Your Honor will recall when the Armitage statement of 1948 was offered in evidence the Koerner statement to Armitage in 1948 was offered in evidence, it was objected to, and it was then stipulated by the Government that that statement coming within the period covered by the fifth count of the indictment was not offered in furtherance of any conspiracy. Now we think the Government's position is woefully inconsistent in now contending that the statement of October 15, 1952, is in furtherance of a conspiracy that comes within that same period.

But entirely regardless of that the Armitage statement was received as an admission against interest against Koerner only and has since been stricken. This statement we submit is not in furtherance of any conspiracy; on its very face it is the antithesis of any conspiracy and consequently we move to strike out the statement first in its entirety for that reason.

The Court: Well, when you say "first" I don't think that will be necessary. I think that the technique would be this: Your motion is to strike the entire statement and then it would be incumbent upon the Government to then rise and indicate any portions thereof in the event that the court should deny your [7006a] motion to strike and the Court will reserve its decision on the motion to strike the entire thing until it has heard what the Government's position was with respect to portions of it.

[7007] Mr. Kiendl: Well, I don't want to get away from the pattern your Honor has set. I am perfectly willing to move to strike out specific portions of it.

The Court: No, I don't want to impose that burden on you. You can content yourself with moving to strike the whole thing and then I think it is up to the Government to rise and point out what sections of the statement, if any, they feel should be excepted. I don't recognize any obligation on the part of the Government, any legal obligation, aside from one of inconsistency, as you have indicated, but I recognize no legal obligation that

merely because they stipulated that Koerner's statement to Armitage was not in furtherance of any conspiracy that they are bound to stipulate that Koerner's statement to somebody else under other circumstances at another time.

Mr. Kiendl: We don't make any such contention, if your Honor please.

The Court: Yes.

Mr. Kiendl: We just point out that it is inconsistent.

The Court: It is inconsistent in your view and I understand that, but I say I don't think that has any——

[7008] Mr. Kiendl: We are not basing it on that. We are basing it on the fundamental contention that the statement in its entirety is not in furtherance of the conspiracy alleged in the fifth count of the indictment and it shows so on its very face, and it was received only as against the defendant Koerner who is now out of this case.

Mr. Bender: I think, your Honor, the picture that confronts us with regard to this exhibit is quite different from the others in the sense that any portion of the exhibit that we move to strike which had some materiality or probative value to the fifth count, then the Government would stand up and say they wanted to except this portion, but I think Mr. Kiendl's position that he is taking and with which I agree is if under any circumstances the only basis upon which this statement or anything concerned in this statement could ever be considered

by the jury as far as these defendants are concerned is if it was made in furtherance of the conspiracy, and since it was not made in furtherance of the conspiracy that no part of it can be admitted and therefore it all should be stricken.

The Court: Well, Mr. Donohue?

Mr. Donohue: May I take the liberty of asking the Court if it would inquire of the prosecutor whether he is offering the statement made by Mr. Koerner as being true or as being false? I think it would make a difference with respect to its admissibility, what the purpose was in offering it.

The Court: Mr. Bauman, are you——

Mr. Bauman: That is a matter for the jury to determine, your Honor, and I would suggest that with relation to the arguments that have been made——

Mr. Donohue: I would think that is a matter for the United States Attorney to determine, whether he is offering the statement on the theory that the answers thereto are true or that the answers thereto are false.

The Court: I don't think you can pin him down to any such election. He is offering the statement for whatever it is worth.

As a matter of fact, I don't agree with Mr. Bender's rationale at all for the simple reason that Mr. Koerner is a co-conspirator in the fifth count and I might indicate to you gentlemen that I propose to allow the Roer statement to be considered too, and not to strike it merely because of the fact

that [7010] he is not named in the fifth count as a co-conspirator. So that whether the Koerner statement is to be received I think that I would be invading the province of the jury if I were to determine whether this statement was made in furtherance of the conspiracy. I think that is a factual question to be determined by the jury. But that doesn't mean that the whole statement is entitled to go in.

Mr. Donohue: May I most respectfully say to your Honor that in offering the statement if Mr. Bauman contends, as I think he must, that it is true, then it is not admissable. If he is offering it on the theory that the statements are false then there is a question as to its admissibility.

The Court: Well, I wish you would develop that a little more, because I don't follow it.

Mr. Donohue: If the statements are true, then they are merely self-serving, your Honor, with respect to the statements made by the co-conspirator Koerner.

If the statements are originally false, then perhaps they would be offered on the theory of admissions and the theory of law would be totally different, and obviously if they are true then they [7011] couldn't be in furtherance of the conspiracy, if there was a conspiracy.

The Court: Well, I have addressed to me, Mr. Bauman, a motion to strike the entire Koerner statement and I think it is incumbent upon you now to indicate what portions, if any, you think should be excepted.

Mr. Bauman: I shall be happy to do that, if your Honor please.

May I refer the Court to the first page of the statement?

The Court: That is the cover page?

Mr. Bauman: Well, no, it is the one listing the appearances, the one with the three small zeros at the bottom.

Mr. Bender: Your Honor, before we get to that, is it at all possible to just discuss with you the last statement you made in answer to my statement?

The Court: Why, of course it is.

Mr. Bender: You said that you disagreed with my rationale and I merely wanted to point out to you this: that if Koerner was a defendant and he made a statement after either the conspiracy ended or a statement which was not in furtherance of the conspiracy, [7012] then under no circumstances could the jury ever permit any statement that he made to be used against any other defendant. The most that they could do would be to use that statement together with other evidence to establish his own participation in the conspiracy.

The Court: Well, may I interrupt, please, to indicate to you that at least in my mind the conspiracy involved in the fifth count, if there was such a conspiracy, began when the Government alleged it began on June 1, 1946.

(Mr. Bender nods.)

The Court: And prevailed not if the Government charges in the fifth count down to the present

time. I think I have indicated that if there was such a conspiracy it extended to the filing of the last return by either Alprin or Koerner, whichever one did it, in 1952.

Mr. Bender: I think it was Alprin. Or both the same, that is right.

The Court: Now, this statement—when was that last return filed?

Mr. Bauman: In March of 1953.

Mr. Bender: In March of 1953.

The Court: Exactly.

[7013] I mean the 1952 return filed in March of 1953.

Now, this statement was made October 15, 1952. So address yourself to the proposition that here was a statement made while, at least in the Court's mind, if there was a conspiracy, that conspiracy still was in existence.

Mr. Bender: Yes. Well, I am only at this moment saying that the mere fact that he is a co-conspirator does not weaken my rationale, at least——

The Court: Well, it does if you pin your rationale on the allegation that this was a statement made after the conspiracy terminated.

Mr. Bender: Exactly; that would be begging the question.

The Court: Yes.

Mr. Bender: The mere fact that the statement is dated at a time prior to when your Honor says

the conspiracy is ended does not by that fact make the statement in furtherance of the conspiracy.

The Court: Exactly.

Mr. Bender: As your Honor is aware, there have to be two factors present, one that the agreement charged in the fifth count must contemplate that [7014] statement would be made by the defendants to the Bureau of Internal Revenue to conceal from them their right to learn the true taxability; and secondly, that the statement itself must be a step in the realization of that unlawful purpose.

The Court: And those, I say to you, sir, are questions of fact to be determined by the jury as to what portion of the statement remains in; it may result that none of the statement remains in.

Mr. Bender: Might I respectfully say this to your Honor: We are dealing here with the admissibility of evidence insofar as it is material or insofar as it affects other defendants, and as far as the admissibility of evidence is concerned that is a function of the Court and has always been, and I think if your Honor considers it from that point of view I think you will come to the conclusion that it is not the function of the jury to say whether this statement is admissible as to the defendant Haas or any of the other defendants because that would be, it seems to me, the function of the Court.

And if it should appear to your Honor that this statement of Koerner was not a statement which was contemplated under the agreement, the alleged [7015] agreement charged, was not a statement made

as a step in the realization or in furtherance of the conspiracy, then under no circumstances could this statement be admitted as to any of these defendants on the fifth count, particularly because Koerner is not a defendant and only a conspirator.

In other words, it would not be admissible as to Koerner since he is not a defendant.

The Court: Now, Mr. Bauman?

Mr. Bauman: With relation to the specific items on that first page to which I made reference listing the appearances, all of page number two up to and including the third question and answer on page number three.

Mr. Kiendl: Does your Honor desire the defendants to voice their opposition to the part——

The Court: Yes; I want to read it first, though.

Mr. Kiendl: All right. I did not want to interrupt.

The Court: To the answer to the third question, did you say, on page 3?

Mr. Bauman: Yes, sir.

The Court: I will reserve on that, depending [7016] upon what transpires with respect to the rest of the statement. So will you go to the next, please?

Mr. Bauman: The second question and answer on page 8.

The Court: Denied.

Mr. Kiendl: One minute, Mr. Bauman. Hasn't that been stricken out already?

The Court: No, the first question and answer on page 8 was stricken, but not the second question and answer.

Mr. Kiendl: Oh, it is the second. I am sorry.

The Court: Yes.

Mr. Bauman: I am working from the original.

The Court: When I say "Denied," I mean that I am not granting the exception to the defendant's motion to strike.

Mr. Bauman: I understand, sir. I am working from a copy which is not marked, so if I refer to a[illegible]y that has already been——

The Court: I will call your attention to it. I have the one you gave me which was marked.

Mr. Bauman: Now, on page 17, starting with the first question on that page and ending with the last question on that page.

[7017] The Court: This has to do with the approval of brokers and selling agents and wholesalers or monopoly——

Mr. Bauman: Yes, whether or not that was a knowingly false statement made to the revenue service in order to impede and mislead them.

The Court: I fail to see where it would have any probative relation to a conspiracy to impede in the collection of taxes, and I will not make an exception of that portion.

Mr. Bauman: Now, sir, with relation to page 22.

The Court: Would you point it out?

Mr. Bauman: Yes, starting with Mr. Victory, at the middle of the page.

The Court: That would be the third question.

Mr. Bauman: Yes, your Honor. And from there to the end of the statement, which concludes at page 36, the Government feels that that material relates directly to the subject matter of the fifth count.

The Court: Do the defendants wish to be heard on the Government's motion that commencing with the third question on page 22 of Government's [7018] Exhibit 249 down through the end thereof be excepted from the granting of the motion to strike?

Mr. Kiendl: Yes, your Honor. The defendant Klein would like to be heard briefly on that subject in opposition to the Government's motion.

Now, we submit, if your Honor please, that although the Government hasn't yet stated so on the record it should be compelled to take a position here and now as to whether this is offered in furtherance of the conspiracy on the theory that it is a false statement. It cannot be offered now, I think we are all agreed, as an admission by a party, Koerner no longer being a defendant, so that the only reason for the admission of this voluntary statement, made under oath by this witness to the Internal Revenue Bureau, is on the theory that it is in furtherance of the conspiracy alleged in the fifth count, which your Honor has so artistically described as an attempt to throw sand in the eyes of the Government officials.

Now, if the statement offered, that portion of it offered, is true, it could not be in furtherance of any conspiracy. It necessarily would have to be

false in order to be admissible. And if it be false [7019] and the Government contends that it is false, then the Government must necessarily contend that the statement made by Mr. Klein was true. This $264,000 draft that was paid to Mr. Koerner could only constitute one of two things.

The Court: I don't agree. I don't agree. It could constitute one of three things; it could be found, and I think I indicated it might have been found—the conspiracy might have been neither a liquidating dividend or earnings——

Mr. Kiendl: I understand——

The Court: It might have been a deal, and if under all the circumstances the jury may find it, I wouldn't disturb that finding and I am frank enough to say so, that Klein called these fellows in 1947, either together or one at a time, and he said, "I am having difficulty and I want to take three-quarters of a million dollars, I am giving you $250,000, you 250,000, you 250,000, but don't use it, let's wait until this thing blows over and then we will see what we will do with it."—I think that can be fairly inferred from the fact that these men were given these checks and put them away, one for three years and the other for five years, $250,000 [7020] just laying idle. So I will not—I don't limit my thinking to the proposition that if Koerner lied when he said it was a liquidating dividend that Klein is necessarily telling the truth, or that if Klein lied when he said it was commissions and individual income for a job well done, a bonus or a gift for a job well done in the Harwood deal, that Koerner is necessarily lying.

It occurs to me that on the background and everything that might be before the jury they could very well come to the conclusion that they were both lying and that the deal was really made was one where Tivoli would just give to some foreign corporation, in the hope that a desk auditor would pass it up on a return, $250,000. And from all of those facts, the fact that they were given to foreign corporations, strange names, Panamanian, or Cuban names, rather, the fact that they didn't disclose who the ultimate intended recipients were to be, the fact that there is a dispute as to why was the check held—Koerner says he doesn't know; Klein says that he only suggested it because he thought that the OPA was doing investigating—all of those factors, Mr. Kiendl, lead me to the conclusion that a reasonable [7021] person might conclude that neither Koerner nor Klein were telling the truth and that the conspiracy was something entirely different.

Mr. Kiendl: Of course, we fundamentally disagree with your Honor that there isn't enough evidence in the record to go to the jury on that proposition. The Government hasn't so contended.

The Court: That is the basis upon which I refuse to grant a judgment of acquittal on the fifth count.

Mr. Kiendl: And there is a concession in this record. As I understand it, that not one dollar of this money was to go to Klein—stipulated by the Government—not one penny of it.

The Court: I didn't say that it ultimately was to go back to Klein.

Mr. Kiendl: No.

The Court: The arrangement might have been that it would just be held aside.

Mr. Kiendl: I know, but you are giving the jury an opportunity to speculate and conjecture, when there is no evidence in this record that we see, or no evidence from which any reasonable inference can be drawn except that this money was paid [7022] either as a liquidating dividend or as commissions, bonus for commissions in the sale of whiskey.

The Court: That is where you and I differ. If I had felt that way, why, we wouldn't be here today.

Mr. Kiendl: I am hoping that your Honor will be convinced that we won't be here tomorrow.

The Court: I am afraid not; I think that is a forlorn hope, Mr. Kiendl. I say that is a fact for the jury to pass upon.

Mr. Kiendl. Your Honor, in your opinion, we called your attention—I think we have in some brief that we prepared—to the fact that your Honor I think inadvertently proceeded on the erroneous impression in your opinion that Mr. Klein was in income tax trouble at the time that these checks were given out. There isn't the slightest indication in this record that he was in any income tax trouble at that time. As a matter of fact, he was not in any income tax trouble until March 3rd of 1948 when the jeopardy assessment was slapped on him

without a word of warning, as the testimony in this case shows.

Therefore, we contend that that portion of the evidence—of the statement of Mr. Koerner—[7023] should be stricken in its entirety.

The Court: Do you wish to be heard, Mr. Bender?

Mr. Bender: No, I adopt what Mr. Kiendl stated.

The Court: Then the disposition is made and the Government's motion to except from the Court's disposition of the defendant's motion to strike the Klein statement of October 15, 1952, is granted to this extent, that there will remain in evidence and not be stricken from the said Government's Exhibit 249 a portion of that exhibit commencing with the third question on page 22, the balance of page 22 from that point; all of page 23; all of page 24; all of page 25, to the bottom of that page, of course; then commencing on page 26 with the second question, the balance of page 26; all of page 27; all of page 28 to the bottom of the page; and then commencing on page 29 with the third question, the balance of page 29; on page 30 commencing with the first question, the balance of that page 30; on page 31 the first question and the answer thereto and the third question, the fourth question which is in two parts, and the answer thereto——

Mr. Kiendl: The only question out on that [7024] page is the second one.

The Court: No. The second question and answer and the last question on the page is out also.

Mr. Kiendl: Thank you.

The Court: On page 32, starting with the first question, down to and including the answer to the fifth question, the balance of the page being stricken.

On page 33, the exception will consist of the first and second questions and the answers thereto, the balance of the page being stricken.

On page 34 the exception will consist of the first and second questions and answers thereto and the third question and answer thereto, the balance of the page being stricken.

On page 35 the exception will consist of the second question and answer thereto, the balance of the page being stricken.

And on page 36 the entire page will be excepted.

And other than as here indicated, the defendants' motions to strike Government's 249 are granted.

Mr. Bauman: Your Honor, I believe, reserved decision with relation to——

[7025] The Court: Oh, yes, indeed. My reason for that was that there would be no purpose in getting these preliminaries in if none of the statements survived, but apparently a substantial part has survived. Therefore, there will be expected from the motions to strike, that is, from the granting of the motion to strike, the first page—by that I don't mean the cover page, I mean the page with the three ciphers at the bottom, which would be page number one, page number two, and down to and including

the answer to the third question on page number three.

* * *

The Court: Now, the next statement in the order in which they appear in the minutes, I believe, is 265, which is the Alprin statement, and that, too, was received in evidence and the reading would not be reflected in the transcript of the minutes of this trial. Yes, that was received, according to my notes, on page 3428.

Do the defendants have any motion with respect to that exhibit?

Mr. Kiendl: We have the identical motion [7026] with respect to that exhibit that we had regarding the previous exhibit, the statement taken from Mr. Koerner, with, of course, the exception of the fact that Mr. Alprin is a party to the litigation and continues to be one of the defendants.

Mr. Bender: Defendant Haas, your Honor, takes the same position, and might I also point out, your Honor, if I may, that at least to the extent that we were required to defend under the fifth count, the bill of particulars limits the Government and in the bill of particulars the Government claims that the respect in which the returns of Alprin, Koerner and Roer were false in the fifth count is that they represented something to be capital gain rather than ordinary income. And there is no question on their statement as to any claim that the agreement is

made out in the fifth count by a mere holding of any of the checks.

And it is for that reason that I say again, without attempting to repeat what Mr. Kiendl and Mr. Donohue said, that if the Government claims that this statement is true, clearly it is not any statement in furtherance of the conspiracy as the Government has alleged.

[7027] The Court: Let me see if I correctly understand what you are saying. That because of the limitations of the bill of particulars the recital that I indulged in this morning that it might be a third thing and neither, is completely out of the case.

Mr. Bender: I think you are rewriting the indictment.

Mr. Kiendl: We take that position, too, your Honor.

The Court: Yes. Well, I am disposed, notwithstanding, to adhere to my original position on it that it can go to the jury on that.

Mr. Donohue: I have no motion to make with respect to Government's 265, if it please your Honor, but I again ask your Honor to insist that the United States Attorney in offering it in evidence state for the record whether he is offering it on the theory that it is in furtherance of the conspiracy or whether or not he is offering it as being false.

The Court: You have stated your request on the record and I am not disposed to do other than I did before.

Now I am confronted with a motion by the [7028] defendants Klein and Hass to strike Government's Exhibit 265.

Mr. Bauman: The Government opposes the striking of that exhibit, and may I respectfully suggest to the Court that in the present posture of things Mr. Donohue has made no motion to strike any part of the statement. I don't know what your Honor's disposition is, but if you would like me to proceed to specify those areas upon which the Government——

The Court: Yes, I think you should, because I will have to rule at least with respect to motions of Klein and Haas.

[7029] Mr. Bauman: Yes, sir.

Now pages number—at least the page with the three ciphers at the bottom.

The Court: Yes.

Mr. Bauman: Page 2, all of page 2.

On page 7 the second to the fourth questions and answers.

The Court: I am afraid I don't follow you. Are you referring to page 7?

Mr. Bauman: On page 7, sir, starting with the asking of the second question and ending with the——

The Court: We must have different copies, Mr. Bauman. The photostat that I have has an answer at the top of the page that takes the entire page except the last line which is a new question.

Mr. Kiendl: If your Honor please, 264 precedes 265 in point of time, doesn't it?

The Court: Wait a minute then, I must be mistaken. Was 264 received before 265?

Mr. Kiendl: 264 is the statement of September 11th, 1952, and 265 the statement of October 21, 1952.

Mr. Bender: I think 265 went in first in the record, your Honor.

Mr. Kiendl: That is the reason.

The Court: That is what I said. The next one [7030] appearing in the record was 265.

Mr. Bauman: I am sorry. I am just confusing things.

The Court: Now just a moment, I am trying to find where 265 came into the record.

265 came into the record at page 3428. 264 came into the record at page 3503 and it was because of that priority that I took 265 first. But there is no pride of authorship involved, if you want to take 264 that is agreeable.

Mr. Kiendl: I was just explaining to your Honor why Mr. Bauman was reading from the other one.

The Court: As long as the minutes show 265 first I will get 265 and we will work on that because it is first in the trial.

Mr. Bauman: All right.

Now as to 265 the Government felt that all of 265 bore on the fifth count. I was reading the exception with relation to 264.

The Court: Well, we will start de novo.

Mr. Kiendl, your motion was addressed to 265?

Mr. Kiendl: Yes, your Honor.

The Court: And Mr. Bender, yours likewise?

Mr. Bender: The same exhibit.

[7031] Mr. Donohue: As was mine, your Honor.

The Court: Well, you made——

Mr. Donohue: My comment, only.

The Court: Yes. All right.

Mr. Bauman: I am sorry there are no specific areas that I would call to the Court's attention, but that is only because the Government believes this entire statement relates to the subject matter of the fifth count.

The Court: Well, I will have to read it through, Mr. Bauman.

Mr. Bauman: May I step out for a moment, your Honor? I didn't have a chance to do so?

The Court: Yes.

(Mr. Bauman leaves the courtroom and returns in a few minutes.)

The Court: (After reading) Defendant Klein's and Defendant Haas' motion to strike Government's 265 is granted but only to this limited extent:

The colloquy commencing after the third question and before the answer to that question on page 3 is stricken.

The fifth question and answer thereto on the bottom of page 4 is stricken.

[7032] And the colloquy before the first question on page 5 is stricken.

The third question and the answer thereto on page 6 are stricken.

Mr. Bender: Will your Honor repeat that, please.

The Court: The third question and the answer thereto on page 6.

Mr. Bender: Thank you.

The Court: The last question, i. e., the sixth question on page 8 is stricken as are the continuation thereof, the answer thereto, and the second question and answer thereto on page 9. And I am reckoning the continuation of the question from page 8 to be a question on page 9, namely, the first because the "Q" appears there, so that there will be no confusion.

On page 17 the first question and answer thereto are stricken.

On page 18 the first question and answer thereto are stricken.

On page 19 the second question and answer thereto and the third question are stricken.

The entire of page 20 is stricken. Page 21 the answer at the top of the page and the first, second [7033] and third questions and the answers thereto are stricken, as is the eight or last question on page 21. And the answer thereto at the top of page 22, and the first question on page 22 and the answer thereto are stricken.

Otherwise the motion is denied.

Now we come to the forerunner of that statement, namely, Mr. Alprin's statement of September the 11th, 1952, which was received in evidence at page 3503.

Will you hold that for a moment until I make some notes on the earlier one.

(After a pause) All right.

Mr. Kiendl: The defendant Klein moves to strike out the entire exhibit 264 on the same ground that he moved to strike out the entire exhibit 265.

Mr. Bender: The defendant Haas makes that same motion that he made with regard to 265, your Honor.

Mr. Donohue: First, if it pleases your Honor, in order to be consistent I ask your Honor to direct the United States Attorney to state on the record whether he is offering Government's 264 on the theory that it is a statement made by the defendant Alprin in furtherance of the conspiracy and is being offered as true or false.

The Court: The same disposition.

[7034] Mr. Donohue: And if it pleases your Honor, I now move the Court to strike from 264 beginning with the first question on page 3 all that follows thereafter to the third question on page 22, and also move your Honor to strike the testimony beginning with the first question asked by the Agent McCarthy on page 37 to and including the last question and answer on page 38.

The Court: All right. Mr. Bauman?

Mr. Bauman: The Government opposes the application of the defendants Haas and Klein with relation to the first page containing the three ciphers and the page which follows, page No. 2.

Then with relation to the applications of all defendants on page 7 commencing with the second question on that page and terminating with the answer to the fourth question.

The Court: Denied.

Mr. Bauman: Starting, sir, with the last question on page 16.

The Court: Yes.

The Bauman: And continuing to the last answer on page 19.

The Court: (After reading) Denied.

Mr. Bauman: Now commencing with the last [7035] question on page 19 to the bottom of page 20.

The Court: Denied.

Mr. Bauman: Now, sir, may I refer your Honor specifically to page 21 because then I gather that Mr. Donohue has made no motion with relation to those pages between 22 and 37. So would your Honor consider page 21 up to the third question—or through the third question on page 22.

The Court: Starting where? At the top of 21?

Mr. Bauman: Yes, sir.

(Court reading).

Mr. Bauman: May I say in connection with page 21 that the defendant Alprin has made no motion, as I recall it, to strike pages 22 and those

that follow to which page 21 in the Government's opinion relates.

The Court: Well, you were addressing yourself to the portion of this exhibit commencing with the first question on page 21 and terminating with the first answer on page 22, is that correct?

Mr. Bauman: No, I am sorry. I have just confused the issue. I am talking about that part of the testimony which commences on page 21 and continues through the third answer on page 22, and Mr. Donohue [7036] has moved that that be stricken.

(Mr. Donohue nods.)

The Court: Oh, yes.

Denied.

Mr. Bauman: Now, sir, with relation to page 22 starting at that point on page 22, namely, the fourth question on that page and continuing to page 37 up to but not including the last question and answer on page 37, and as to that, as I understand it, there is no motion in the record by the defendant Alprin.

Mr. Donohue: That is correct, Mr. Bauman.

The Court: The defendant Alprin moves to strike from the first question on page 3 to the third question on page 22 and from the first question by McCarthy on page 37 to the last question and answer on page 38, is that correct?

Mr. Donohue: Yes, your Honor.

The Court: Now my recollection is that you said you wanted a portion excepted from the granting

of the motion to strike between the answer to the third question on page 22 and——

Let me put it this way: from the fourth question on 22 through the answer to the fifth question on 37. Is that correct?

[7037] Mr. Bauman: Yes, your Honor, that is correct.

The Court: All right. Now, do you have any further exceptions?

Mr. Bauman: I do, sir.

Starting on page 39 and from there to the end of the statement to which I believe the——

The Court: The top of the page? The first question?

Mr. Bauman: Well, I noticed Mr. Donohue hasn't moved to strike that and I am not moving to strike that.

Mr. Donohue: I think I would like to include, if I may, in my exception the first question and answer on page 39 rather than stopping at the answer to that question on page 38.

The Court: To the first question on 39?

Mr. Donohue: Through.

The Court: Through.

Mr. Bauman: I recognize that as within the area of your Honor's rulings, so I should like to ask your Honor to consider from the second question on page 39 to the end of the statement, to which I understand Mr. Donohue has addressed no motion.

But I should like with relation to the bottom of page 47, wherein Mr. McCarthy made the following

[7038] comment: "You have been a very cooperative witness" to move to strike that comment for two reasons: One, it was no part of the interrogation as such.

Two, had it been a statement that Mr. Alprin had been an uncooperative witness it would clearly and should have been stricken.

Three, Mr. McCarthy was expressing his own personal conclusion.

Four, at the time that Mr. McCarthy made that statement he obviously had in mind the entire of the Alprin testimony on this day.

The Court: Mr. Bauman, may I interrupt you a moment, please?

Mr. Bauman: Yes, sir.

The Court: I want to get this clear in my mind.

Klein moved to strike the entire statement which would include this particular statement on page 37. I think you said it was. So did Haas. Now Alprin only moved to strike pages 3 to 22 and 37 to 39.

Mr. Bauman: Yes, sir.

The Court: So now you are asking that it not survive as to——

Mr. Bauman: As to this remark of Mr. McCarthy.

[7039] The Court: Yes.

Mr. Bauman: And offering as an additional reason to those already expressed that at the time that Mr. McCarthy made that statement and in connection with his making it he had before him the entire statement given on that day by the witness

Alprin much of which has here been stricken on the motion.

The Court: Well, he suffers from the same affliction that I have, a glib tongue, saying things and being sorry afterwards that you said them. But that's about all. Well, I will consider it.

Your motion is that there be excepted from Klein's and Haas' motion to strike all of the exhibit, Government's 264, commencing with the second question on page 39 down to the end, is that correct?

Mr. Bauman: Yes, your Honor, that is correct.

The Court: Except the portion that is that comment on page 47.

Mr. Bauman: Yes, your Honor. I assume that that is included.

[7040] The Court: Various motions to strike Government's Exhibit 264 are disposed of as follows:

Granted as to pages 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and down through the answer to the third question on 22.

Granted as to the portion of the exhibit commencing with the sixth question on page 37 and continuing through the answer to the first question on page 39. Otherwise denied.

* * *

Afternoon Session, 2:15 P. M.

[7043] The Court: Now I think the next statement would be that of Roer which came into the record as a past recollection recorded of Kiven, the reporter who took that statement, and if my recollection is correct he was permitted to read that from the

transcript after the Court, using the transcript, had ruled upon certain motions to delete portions by the defendants. The reading commenced at page *3557*, and that not being an exhibit, i.e., the transcript, although the original stenotype notes were, I assume that we will have to consider that from the stenographer's minutes of this trial. Is that correct, gentlemen?

Mr. Donohue: Yes.

Mr. Bender: Yes.

Mr. Kiendl: Correct.

Mr. Bauman: It is, your Honor.

[7044] The Court: Now this is a statement of a person who is neither a defendant nor is he characterized as a co-conspirator in the fifth count, although one part of the fifth count does deal with his return as being a product, so to speak, of the conspiracy charged in the fifth count. And I am going to ask first if defense counsel wish to make any statement on the record with respect to the admissibility on that score as distinguished from other bases.

Mr. Kiendl: Yes, your Honor. Very briefly, we read the Government's brief in which they have called attention to the Dennis and other cases, and those cases, as we read them and as they are described in the brief, cover situations where the so-called co-conspirator not named in the indictment is an unknown person named in the indictment.

The Court: Yes.

Mr. Kiendl: Now here, as I understand it, the Government has not and cannot contend that Mr. Roer was an unknown person. Therefore those cases as we view them are inapplicable and therefore in our view the entire testimony is inadmissible.

The Court: And I take it that preliminarily on that score you are moving to strike the entire statement.

[7045] Mr. Kiendl: In its entirety.

The Court: Do you join in that?

Mr. Bender: I join in that motion, and I say in addition thereto that in any event the statement by Roer is not a statement which was made in furtherance of the conspiracy and so also would not be admissible under the fifth count, and I join in the motion to strike.

Mr. Donohue: I join in the motion, if your Honor please.

The Court: Denied.

Now then we will go to the consideration of the statement itself. Do you wish to address any motions on the substance?

Mr. Kiendl: The defendant Klein moves to strike it out in its entirety on precisely the same grounds he moved to strike similar statements of the witness Alprin and the witness Koerner.

Mr. Bender: The defendant Haas moves to strike it out on the same ground and on the further ground that it is not binding as to him anyway.

Mr. Donohue: I renew, if it pleases your Honor, my request of the Court to instruct the United States Attorney to indicate on the record whether

this [7046] statement is being offered as true or false and in furtherance of the conspiracy. Otherwise I have no motion.

The Court: The same disposition is made of that request as heretofore.

Now the Government is called upon to indicate what portion, if any, of the statement it feels should be exempted from the granting of the motion to strike in the event the motion is granted.

Mr. Bauman: Starting at the top of page 3557 after the first question starting with the line that says: "Reading".

The Court: Yes.

Mr. Bauman: Continuing through that page and through the answer to the second question on 3558.

The Court: Well, I will reserve on that and see whether any other portions are——

Mr. Bauman: In that same category, your Honor, starting with the word on page 3560—the word "Question" by Mr. Victory, the eighth line on that page——

The Court: Yes.

Mr. Bauman: Through the answer to that latter question which terminates on the sixth line of page 3561.

The Court: I will reserve on that also.

[7047] Mr. Bauman: Page 3569 the first question and answer.

The Court: That will be granted.

Mr. Bauman: 3571, sir, starting with the second question and terminating with the end of the page.

Mr. Kiendl: Give me that again, Mr. Bauman.

Mr. Bauman: 3571 starting with the second question and terminating with the end of the page.

The Court: Denied.

Mr. Bauman: 3575—would your Honor permit me to withdraw that, please?

3598 to the end of the statement, which ends on 36——

The Court: Starting where? At the top of the page?

Mr. Bauman: Yes, sir, and ending with the end of the statement on page 3625 at the middle of page 3625.

[7048] The Court: The defendants' motions to strike the Kiven testimony of the Roer statement of October 23, 1952 are granted except that portion of the statement appearing on page 3557 of the stenographers' minutes of this trial, commencing with the word "(Reading)" and continuing on page 3558 through the answer to the second question.

Also excepted from the granting of said motion to strike is the testimony on page 3569 of the record of this trial consisting of the first question and answer thereto on said page of these minutes.

Also excepted therefrom is that portion of the minutes of this trial commencing with the first question on page 3598 and continuing through the answer to the first question on page 3608, resuming on page 3608 with the second question on that page,

continuing to the end of the testimony with the answer to the first question on page 3625.

That would bring us to the Haas statement.

Mr. Bender: I think you have one thing before, Exhibit 315.

The Court: No. We checked that and found that it had to do with the Waldorf file.

Mr. Bauman: I think, sir, that comes about, [7049] as I recollect it, because I think that was the case where there was a statement, a bank statement, without any supporting check, and——

The Court: Yes.

Mr. Bauman: It was reserved so that we could make reference to the appropriate bank record which had the supporting check.

The Court: Yes.

Mr. Bauman: We will come to that after we finish with the statement if the Court wishes.

The Court: All right. Then we come to page 4608, and there we have the reading of the Haas statement into the record from that point to page 4713.

Mr. Kiendl: If your Honor please, I wonder if 268-B hasn't been overlooked. That is a statement of Roer of October 16, 1953. Some of that was read in evidence.

Mr. Bauman: Would your Honor look at page 3554 with relation to 268-B.

Mr. Kiendl: Is it in or out?

Mr. Bauman: My recollection is that it was out, but I think it still is out, myself.

The Court: Well, that is the page that I have on my notes, particularly Mr. Bauman's statement. You have to go back a little ways, to the top of page 3553 where [7050] Mr. Kiendl says:

"Your Honor, may I make a statement? There are only eight or ten pages, as I understand it, of this other statement involving Mr. Roer, and as I understand it—if I am wrong you correct me, Mr. Greenman,—all of it is directed—almost all of it is directed to questions of these certificates of indebtedness in the Shaskin account which your Honor has already ruled on.

"Mr. Greenman: Yes, we object to pages 3 through 8.

"The Court: What pages?

"Mr. Greenman: 3 through 8.

"Mr. Kiendl: Couldn't we save some time by disposing of it now?

"The Court: All right, let's look at them.

"(After reading): Objection sustained as to page 3.

"Now of course I want to be clearly understood and I want the record to show that in discussing Government's Exhibit 268-B for identification, first, it has not been offered.

"Mr. Kiendl: That is right.

"The Court: Second, the stenographer's notes [7051] that form the basis of this transcript have not been offered.

"Third, that by agreement we are consulting Government's 268-B deeming it to be a correct

transcription of the stenographer's notes taken at the Roer interrogation of March 16, 1953, on the assumption that the Government will in some way attempt to use those notes.

"Mr. Bauman: Yes, that is quite correct.

"The Court: All right.

"(After reading) Page 4, the objection is sustained to that.

"Page 5, sustained.

"Page 6, objection to that is sustained."

Then Mr. Bauman said: "Your Honor, in the interests of saving time in the light of what your Honor has sustained objection to, the Government will not offer this supplemental statement until such time as we feel it will comply with the relevancy requirements your Honor has expressed.

"The Court: All right. 10.30 tomorrow morning."

Now was it ever subsequently offered? If it was my notes don't show it.

[7052] Mr. Bauman: My recollection is it was not, because it related almost entirely to the excluded area.

The Court: It related to the Shaskin account.

Mr. Bauman: That is right.

Mr. Kiendl: I have most of it stricken out on my copy. But if your Honor agrees——

The Court: What you probably noted on your copy was my rulings at this time.

Mr. Kiendl: I believe that is right, your Honor.

The Court: But my notes indicate that it was merely an exhibit marked for identification and never apparently read into the record.

Mr. Kiendl: May we take it then subject to correction that no part of that statement of March 16, 1953, is in evidence here subject to correction if anybody desires to correct it?

Mr. Bauman: That is agreeable to the Government if it is to the Court.

The Court: Unless somebody can dig it out of these tomes I don't know that we will have to concern ourselves with it (laughter).

I can assure you of one thing, that unless [7053] somebody points it up to me in my recital of the evidence to the jury I am not going to say that it is in. I am just going to ignore it completely.

Mr. Kiendl: We have agreed that it is out subject to——

The Court: Yes. All right. Now then that brings us again to the Haas statement.

(To Mr. Donohue): Yes, sir.

Mr. Donohue: May it please your Honor, before passing to the Haas statement I call to your Honor's attention that while we were considering the testimony of the witness Baker it is my recollection that your Honor withheld your ruling on whether or not the statements made to the witness Baker by the then defendant Roer should or should not be admitted until your Honor decided the question whether his own statement, Roer's, should be admitted in evidence. Having made that decision I

now call to your Honor's attention that you did not pass at that time on the admissibility of that evidence. I think I should remind your Honor of that fact.

The Court: Well, could you——

Mr. Donohue: May 19th was the date of his testimony.

[7054] Mr. Horowitz: 3615.

Mr. Bauman: Now, sir, with relation to the point that Mr. Donohue has just raised I think the disposition of Baker's testimony starting at page 6817. This is the disposition that your Honor made. And it continues to 6821, and it is that where Mr. Donohue said: "May I ask your Honor in line of reserving your judgment with respect to statements made by the then defendant Roer"——

(Mr. Donohue nods.)

Mr. Bauman: Where Mr. Donohue asked you to reserve judgment. That starts at page 6821.

The Court: I am now ruling that the testimony of the witness Baker of his conversation on March 10, 1952, with Roer as reflected at about page 3656 of the minutes will be received as to all defendants.

[7055] Mr. Bender: Your Honor, might I inquire whether this particular statement that you refer to was a statement made to this witness some six years after the alleged conspiracy was supposed to have started in the fifth count, and, if so, shouldn't that follow along the same lines as your Honor has ruled with regard to anything after June 1, 1946?

The Court: You may inquire, Mr. Bender, and I am giving you my answer, I have made my ruling; I don't propose to justify it.

Now that brings us down to——

Mr. Bauman: Sir, may I ask one question, please?

The Court: Yes.

Mr. Bauman: I just wanted to know if your Honor in making that ruling has considered the conversation of March 13th at page 3657. Your Honor said——

The Court: I said March 10th.

Mr. Bauman: No——

The Court: And then there was another one at page 3657, a few days afterwards.

Mr. Bauman: Yes, sir, that is correct.

The Court: You are quite correct, and that is included in the ruling. My recollection is that the [7056] entire Baker statement was received with the exception of that section that was reserved at Mr. Donohue's suggestion.

Mr. Kiendl: I think that is right.

The Court: And I am now receiving that, together with the other portion that was received as one unit as though the reservation had never been made.

Now, I want to get into the home stretch, gentlemen. Is there anything else that will impede us in getting to the Haas statement?

Mr. Bauman: None that I know of, Judge.

* * *

The Court: All right. The Haas statement commenced on page 4,608. Is that correct, gentlemen?

Mr. Bauman: That is right, sir.

The Court: It would be testimony of the scrivener or reporter who took it, except by stipulation it was agreed that it could be read from the witness stand from a transcript of the stenographer's notes. In other words, it is not an exhibit. And I think I have heretofore indicated the duration as being from page 4608 to page 4714.

Mr. Kiendl: Defendant Klein moves to strike it out in its entirety, if your Honor please, for the same reason that he moved to strike out the [7057] testimony of the statement of the witnesses Roer, Alprin and Koerner.

Mr. Bender: I have some motions, your Honor, with regard to what I would like to strike out of the statement, and there are portions of the statement that I do not move to strike at all.

The Court: Before we come to yours, Mr. Bender, do you have any motion, Mr. Donohue?

Mr. Donohue: No motion, your Honor. But for the last time, fortuitously, hazarding the fact that I understand that consistency is the disease of the small mind, for the last time I ask your Honor to direct the United States Attorney with respect to the statement made by Mr. Haas to place on the record whether or not it is being offered in furtherance of the conspiracy and whether or not the Government contends it to be true or false.

The Court: And there will be the same disposition, and anent your characterization I will not

demand a bill of particulars and so that will relieve us all.

Now, Mr. Bender, do you want to state the areas that you are asking to be stricken?

Mr. Bender: Yes. The portions of the defendant [7058] Haas's statement to the Bureau of Internal Revenue to which the defendant Haas moves to strike out as follows:

Beginning with the first question on page 4615 to the last answer to the question, or, rather, to the answer to the last question on page 4617. Do you want me to continue on?

The Court: Yes. Give me the whole list, please.

Mr. Bender: Beginning with the last question on 4622 through the answer——

The Court: To or through?

Mr. Bender: Can I start over? I withdraw that and start it this way: Beginning with the last question on page 4622 to the answer to that question on the top of page 4623.

The Court: I asked to or through. If you go to an answer you are left with an unanswered question.

Mr. Bender: Through, your Honor.

The Court: Through?

Mr. Bender: Yes.

The Court: Through what, please?

Mr. Bender: The answer to that question [7059] appearing on the top of page 4623.

The Court: Thank you. Next?

Mr. Bender: Beginning with the third question on page 4624 through the answer to the second question on page 4628.

The Court: Through?

Mr. Bender: Through.

The Court: Through the answer to the second question on what page, please?

Mr. Bender: 4628.

The Court: Thank you.

Mr. Bender: Beginning with the first question on page 4630 down to and including the answer to the fifth question on that page.

Beginning with the last question on page 4635 through the answer to that question appearing on the top of page 4636.

Beginning with the first question on page 4640 through the answer to the second question on page 4652.

Beginning with the last question on page 4652 to the top of page 4656, which would merely be a continuation of the last answer on page 4655 which is concluded in the top two lines on page 4656.

[7060] Beginning with the first question on page 4658 through the answer to the second question on page 4660.

Beginning with the first question on 4661 to the end of the page.

Beginning with the first question on page 4663 through the answer to the second question on that page.

Beginning with the first question on 4680 to the end—withdraw that—to the end of page 4686.

Beginning with the third question on 4692 through the answer to the first question on page 4693.

Beginning with the first question on 4695 through the last answer on page 4696.

Beginning with the second question on 4697 through the last answer on that page.

Beginning with the first question on 4698 through the answer on the top of page 4699.

Beginning with the last question on 4700 through the second answer on page 4704.

The first question on 4708 to the end of the testimony on page 4713.

The Court: Now, Mr. Bauman—but before we hear you, I think we will take a short recess.

(Recess)

[7061] Mr. Bauman: The Government opposes the granting of the motion with respect to the following portions of the Haas statement:

Starting on the 17th line of page 4608, which reads "Testimony of Morris A. Haas,"——

Mr. Donohue: 4608?

Mr. Bauman: Yes, continuing through the first question and answer on page 4613.

The Court: Just a moment. I think we will take these as you bring them up.

The Court: (After reading) Granted, that is, it will be excepted from the ruling to strike.

Mr. Bauman: 4617.

Mr. Bender: Sorry, would you repeat that?

Mr. Bauman: 4617.

Mr. Bender: Beginning?

Mr. Bauman: No; the last question, through the last answer on page 4619.

The Court: Well, then, you apparently automatically consent to the first area which the defendant Haas asked to be stricken, i.e., from the first question on 4615 through the last answer on 4617.

Mr. Bauman: I have no objection to that, your [7062] Honor.

The Court: No, I am just inquiring.

Mr. Bauman: Yes.

The Court: Granted.

Mr. Bauman: Starting on 4628, your Honor,——

Mr. Kiendl: May I interrupt, Mr. Bauman? Where did the last one stop? From 4617——

Mr. Bauman: 4617, it went to——

The Court: It went through the last answer on 4619.

Mr. Kiendl: Thank you.

The Court: Now, where on 4628?

Mr. Bauman: The last question, your Honor, on 4628 through the answer to the fifth question on 4630.

The Court: Well, then, that would automatically pose no opposition to Haas's motion to strike the next two categories, i.e., the last question on 4222 through the answer to that question on page 4623 and the third question—from the third question on

4624 to the answer to the second question on 4628, because you pick up at the last question on 4628.

(Mr. Bauman nods)

The Court: All right.

(After reading) That is denied.

[7063] And that would automatically grant Haas's motion to strike from the first question on 4630 through the answer to the fifth question on 4630.

Next?

Mr. Bauman: Now, Judge, I have in mind what I have been doing, that the rest of this statement is admissible, what I have been doing is breaking it up into categories for your Honor's consideration.

The Court: All right.

Mr. Bauman: Would you rather I continued that?

The Court: Surely.

Mr. Bauman: Starting with the sixth question on page 4630 through the answer to the second question on 4631.

The Court: Denied.

Mr. Bauman: On the third question on page 4631 through the answer to the third question on 4633.

Mr. Bender: The fourth question on 4631, Mr. Bauman? What did you begin with?

Mr. Bauman: The third question on 4631.

Mr. Bender: That is what I wanted.

[7064] The Court: You will have refresh me, gentlemen. The consolidated report referred to prepared by Haas is not in evidence.

Mr. Bauman: It is not.

Mr. Bender: No.

The Court: Denied.

Mr. Bauman: That took us up to——

The Court: That took us up to the answer to the third question on 4633.

Mr. Bauman: May I call the Court's attention specifically to the first question and answer on 4633?

The Court: Well, I have read them. I fail to see what relationship they have to the fifth count.

Mr. Bauman: Well, the relationship as to that question, sir, is to be read in the light of the testimony of the witness Renee Bennett.

The Court: I may be mistaken, Mr. Bauman, but I don't think it is admissible on that basis. Haas has not taken the stand and denied it and being confronted with a prior inconsistent statement. What you are asking is to offer a statement by Haas that he never saw the books, which would be a contradiction of his statement by Bennett that she made a change in the books at his request. I don't [7065] think it is admissible on that basis.

Mr. Bauman: Well, only insofar as it may be one fact, Judge, which tended to—I mean, the making of this statement could be considered a fact or an attempt——

The Court: I know, but the point is this, it is true that in the Government's case you have pre-

sently uncontradicted Bennett's statement that she made that alteration or insertion, rather, I should say at Mr. Haas's direction.

Mr. Bauman: The only question is, Judge, if I may put it, is: was his statement that he had never seen the books of any of Klein's enterprises other than H. Harvey Company, Cambridge and Bellaire, an attempt by Haas in furtherance of the conspiracy to confound the Government in the performance of its Governmental functions.

Mr. Bender: May I point out, your Honor, that the Government's evidence in the case indicates clearly that at the time Miss Bennett claims that Haas instructed her to make——

The Court: I don't go to that on that basis. I go to it on a realistic basis. If you turn to 4631, that was a loaded question they asked him there because [7066] they talked to him at 4631 about auditing and he made it very clear that he was auditing Harvey and Bellaire and Cambridge Industries—or Cambridge, and then they slough along and talk about a combined return, and then they say at the bottom of 4632, "Did you have any of the books of any of these companies to examine?" "Did you ever see any books * * * other than Harvey * * * ?" I don't know. No, I will exclude it. It is too remote and I still feel that it is not admissible in view of the fact that it is not a prior inconsistent statement with anything he has said. It is a prior statement inconsistent with something that Bennett has implied.

I think I understand your point, but I don't accept it.

Mr. Bauman: My only point is——

The Court: Yes.

Mr. Bauman: That if this statement was made to a revenue official investigating Mr. Klein's internal revenue problems for the purpose of misleading that revenue official or is part of the conspiracy to mislead that revenue official, that it is a fifth count—that it is a fact properly within the fifth count.

[7067] The Court: No, I am afraid I can't accept it, Mr. Bauman.

Mr. Bauman: All right, sir. Now, starting with the last question on 4633 and concluding with the answer preceding the first question on 4636.

The Court: In that area you come in conflict with Haas's motion to strike the last question on 4635 through the answer to that question on 4636.

It is granted in its entirety.

Mr. Bauman: Now, starting with the first question on page 4636, your Honor, and continuing through the last answer on 4643.

The Court: Well, there you overlap a portion of the statement which defendant Haas has asked be stricken commencing with the first question on 4643—excuse me—4640, and continuing through the answer to the second question on 4652, which automatically includes that portion from the first question on 4640 through the last answer on 4643.

Mr. Bauman: Yes, sir. The Government opposes defendant Haas's application.

The Court: It is granted as to the portion of the statement commencing with the first question on page 4636, all of 4637, all of 4638, and all of [7068] 4639. However, all on 4640, 4641, 4642 and 4643 through the answer to the fourth question is stricken.

Mr. Bauman: Starting with the last question on page 4643——

The Court: Will you suspend for just a moment, please?

Mr. Bauman: Yes, sir.

The Court: All right.

Mr. Bauman: Starting with the last question on page 4643, your Honor, and continuing through the answer to the fourth question on 4647.

The Court: (After reading) Granted as to the portion commencing with the last question on 4643 down through the answer to the fourth question on 4644, resuming with the seventh question on 4644, all of 4645 down to the answer to the fourth question on 4646; otherwise no exception will be made up to the answer to the fourth question on 4647.

Mr. Bauman: Starting with the fifth question on 4647 and terminating with the first answer on 4652.

The Court: That is denied.

Mr. Bauman: Starting with the first question on 4652 and terminating with the bottom of page 4653.

[7069] The Court: Granted to the extent of excluding from the ruling on the motion to strike the portion commencing with the last question, i.e., the fourth question on page 4652 and all of 4653.

Mr. Bauman: Starting at the top of 4654—Judge, from here on this statement relates to the knowledge Haas had of Alprin's draft of $264,000, the handling of it, his conversations with Alprin about it, his receipt of the La Ribera check, the circumstances of its receipt and the deposit. From here to about the end of the statement, according to my notes, is pretty well intertwined. I don't know that I can break it into little groups of this kind.

The Court: I will read it and see what it is.

Mr. Bauman: The next group that I had marked off, if it is of any assistance, ends at the first answer on page 4658.

The Court: (After reading) Well, ruling on the Government's requests for exceptions to the defendants' motions to strike from the Haas statement commencing with the first question on page 4654 and going down to the end of that session, i.e., 4667, the motion to strike is granted as to all of page 4654 and all of page 4655 down to the first [7070] question on page 4656.

There will be excepted from the granting of the motion to strike the testimony commencing with the first question on page 4656 and the balance of that page, all of 4657 down through the answer to the first question on 4658, then the first question and answer thereto on 4659, and the third question and

answer thereto, and the remaining questions and answers on 4659 down to and including the answer to the first question on 4660.

The exception continues with the first question on 4661 for the balance of that page, all of page 4662 to the end of the answer carried over from the bottom of 4662 on to page 4663, and then resuming with the last question on 4663, all of 4664, and again commencing with the first question on 4665 down through the answer to the fourth question on that page. Then resuming with the first question on 4666 to the end of the session manifested by the answer to the fourth question on page 4667.

* * *

[7071] New York, July 14, 1955;
10.30 o'clock a. m.

Trial resumed.

Mr. Bauman: Your Honor, I have gone along breaking this statement up into particular portions. I think the next portion starts with the continuation of testimony of Maurice A. Haas.

The Court: On 4667.

Mr. Bauman: On 4667 and runs to 4694.

The Court: Do you want to point out any specific portion of that or was that included in your statement of yesterday that you thought that the entire balance of the Haas statement was admissible under the fifth count?

Mr. Bauman: No, I think, sir, that the entire balance is admissible under the fifth count.

The Court: All right.

Mr. Bauman: But I do think that the portion to which I just referred your Honor is one coordinated unit as opposed to some of the others which we will come to later.

[7072] The Court: I will look it over.

(After pause.) The Alprin 1947 Federal income tax return is not in evidence? Am I correct in that?

Mr. Donohue: That is correct, your Honor.

Mr. Kiendl: That is right.

Mr. Bauman: Yes, your Honor.

The Court: (After reading.) With respect to the defendants' motion to strike that portion of the Haas statement as taken by the reporters contained in the stenographer's minutes of this trial from the 18th line on page 4667 through the answer to the first question on page 4694 inclusive is granted with the following exceptions:

Commencing with the 18th line on page 4667 through all of page 4668, all of page 4669 and down through the answer to the first question on 4670.

The next section commences——

Mr. Horowitz: Would your Honor please give me the last part of it? Down through the answer to the first question on what page?

Mr. Kiendl: 4670.

The Court: 4670.

[7073] Mr. Horowitz: Thank you, your Honor.

The Court: The next exception in that portion of the testimony occurs commencing with the fourth question on page 4674, all of page forty-six hundred—excuse me, that is, commencing with the fourth question on page 4675, all of page 4676 down to the first question on 4677.

The next exception is on page 4677 and consists of the fourth question and the answer thereto on that page.

The next exception is on page 4678 and consists of the second and third questions and the answers thereto on that page.

The next exception is on page 4680 and commences with the first question on that page, continues through the entire page, all of page 4681, all of page 4682, all of page 4683, all of page 4684, down to the first question on 4685.

Mr. Bauman: To the first question?

The Court: "To".

Mr. Bauman: Yes.

The Court: The next exception occurs on page 4691 commencing with the first question on that page, continuing through that page, through all of [7074] 4692, all of 4693, and down through the answer to the first question on 4694.

Mr. Bauman: The next group that I have marked off, your Honor, starts with the first question on page 4695 and terminates with the last answer on page 4696.

The Court: Denied.

Mr. Bauman: The next one starts with the last question on 4696 and terminates with the last answer on page 4697.

The Court: That is granted. There will be excepted from the striking of the Haas statement the testimony contained in the minutes of this trial commencing with the last question on page 4696 down through the answer to the fourth question on page 4697.

Mr. Bauman: The next starts with the last question on 4697, your Honor, and terminates with the first answer on 4699.

Mr. Bender: That is through the first answer?

Mr. Bauman: Through.

The Court: Denied.

Mr. Bauman: Now the next starts with the first question on page 4699 and terminates with the [7075] last answer on page 4700.

Your Honor, at page 4699, on the third line of the answer which was read into the record of the stenographic minutes of this trial, "When Roer did either or I told Klein the name of the corporation"—I have before me the stenographic minutes of the interrogation which was read into the minutes of this trial——

Mr. Bender: What page?

Mr. Bauman: At page 76 of that interrogation, and it reads, "I have to answer it this way. Klein told me that he was going to have Roer turn over the corporation to me. When Roer did either he or

I told Klein the name of the corporation then Klein made out a check to that corporation."

Mr. Bender: That is correct, according to the statement.

Mr. Bauman: May I move that the minutes of the trial be amended to that extent, sir?

The Court: Any opposition?

Mr. Kiendl: No.

The Court: Hearing none, it is so ordered.

If I correctly read my notes on Mr. Bender's motion to strike, the portion that you ask be not stricken, [7076] i.e., from the first question on 4699 through the last answer on 4700, you are both in agreement that you want that to remain in; is that correct?

Mr. Bauman: That appears to be so, your Honor.

Mr. Bender: I believe so.

The Court: There was a motion by Klein to strike the entire testimony, and so on that basis the exception is made and there will be excepted from the motion to strike the portion commencing with the first question on 4699 and ending with the answer to the seventh question on 4700.

Mr. Bauman: Starting with the eighth question on 4700 and terminating with the second answer on 4704, and my notes indicate that Mr. Bender has moved to strike that portion of the testimony.

The Court: You say terminating with the second answer, that will be the answer to the second question, right, on 4704?

Mr. Bauman: Yes, your Honor.

The Court: No exception will be granted. That is denied.

Mr. Bauman: Starting with the third question on 4704, your Honor, and terminating with [7077] the answer to the second question on 4710.

The Court: There will be excepted from the order to strike the following further of the Haas statement: Commencing with the third question on page 4704, the balance of that page down through the answer to the first question on page 4705.

The next exception occurs on page 4709 commencing with the first question, the balance of that page, and then down to the answer to the second question on page 4710.

Mr. Bauman: Now the next one, sir, starts with the third question on page 4710 through the first answer on 4711.

The Court: Denied.

Mr. Bauman: Starting with the first question on 4711 and continuing through to the end of the statement on page 4713, I believe it is.

Mr. Bender: Yes.

The Court: Denied

* * *

That would appear to include all motions to strike, is that correct, gentlemen?

[7078] Mr. Kiendl: That is right.

Mr. Bauman: I suppose that does, but there are several instances where testimony has been retained

in the record by specific witnesses and the remainder of their testimony, including the identification of those individuals has been stricken; and I believe I advised the Court of that yesterday and said I intended to make motions to restore enough of their testimony to identify the witnesses where that situation exists, and I would like with the Court's permission to address myself to such motions.

The Court: You may.

Mr. Bauman: On page 428 of the record.

The Court: Just one moment, please. Yes?

Mr. Bauman: On page 428, sir, the first three questions and answers.

Mr. Kiendl: Could I see your copy, Mr. Bauman? We haven't our volumes here. They are all down in the office. We didn't know you were going to move.

Mr. Bauman: Yes, sir (handing).

Mr. Kiendl: (after reading) We have no objection to that.

[7079] Mr. Bender: May I see that?

(Handed.)

Mr. Donohue: Who is the witness?

Mr. Bauman: Lowy.

Mr. Donohue: No objection.

(Mr. Bender shakes his head.)

Mr. Bauman: I gather from defense counsel that they do not object.

Mr. Bender: That is true, your Honor.

Mr. Bauman: I also ask that the first and ninth questions on page 429 and the answers thereto be retained.

I understand that there is no opposition to those.

The Court: Granted.

Mr. Bauman: On page 1131, your Honor——

Mr. Kiendl: May I come and look over your shoulder?

Mr. Bauman: Well, Mr. Bender wanted to, too.

On page 1131—I gather some of this has been retained.

Mr. Horowitz: No, it is all out.

(Counsel confer.)

Mr. Bauman: Your Honor, I am addressing [7080] myself to the questions and answers of the witness Salvatore on page 1131 and the first seven questions and answers on page 1132.

The Court: Will you read back what Mr. Bauman just said.

(Record read.)

The Court: Any objection?

Mr. Kiendl: Defendant Klein has no objection.

The Court: All right, it is granted and that portion will be excepted from the granting of the motion to strike.

Mr. Bender: Off the record.

(Discussion off the record.)

Mr. Donohue: We have no objection.

Mr. Bender: We have no objection.

Mr. Bauman: Your Honor, I am addressing myself now to pages 1357 and 1358, the first four questions and answers on 1358.

The Court: Any objection?

Mr. Kiendl: The defendant Klein has no objection.

Mr. Bender: No objection, your Honor.

Mr. Donohue: No objection, your Honor.

[7081] The Court: Granted, and that portion will be excepted from the granting of the motion to strike.

Mr. Bauman: Now, sir, addressing myself to page 4087 of the record, all of the questions and answers on that page, and the first two questions and answers on 4088.

Mr. Bender: No objection.

Mr. Donohue: No objection, your Honor.

Mr. Kiendl: No objection.

The Court: Granted, and that portion will be excepted from the granting of the motion to strike.

Mr. Bauman: Now the last one of those is page 4499, sir, and continuing through the answer to the second question on page 4500.

Mr. Kiendl: We have no objection to that.

Mr. Bender: We have no objection, your Honor.

Mr. Bauman: I have no objection.

The Court: Granted, and that portion will be excluded from the granting of the motion to strike the testimony of Burke.

Mr. Bauman: Now, sir, we come to the bank records that the Government would like to keep in the record.

* * *

[7084] Well, I should now like to proceed to offer those documents in the excluded bank records that are necessary to show the transfer of the funds in the period about which we have talked.

Mr. Kiendl: Why can't we stipulate all that?

The Court: Well, that's what I was wondering.

Mr. Bauman: That is all right.

The Court: Nobody seriously contests that this money, these checks that were drawn in New York [7085] finally came to a resting place in Canada, do they?

Mr. Kiendl: The checks were duly honored, duly deposited and duly cancelled or anything of that kind that you want.

Mr. Bauman: Well, are we all agreed as to that?

Mr. Donohue: I am certainly willing to stipulate if Mr. Kiendl is.

* * *

[7086] Mr. Bender: As far as I am concerned, your Honor, I am not going to raise any problem.

The Court: Well, you were the only one, Mr. Bender, that did not forthright say so and I was really directing my remark at you. Mr. Kiendl said he would stipulate and Mr. Donohue said he would stipulate, and I would be very happy if I would hear you say, "I will stipulate."

Mr. Bender: Well, the only reason I hesitated was because I wasn't sure in my own mind just what Mr. Bauman wanted me to stipulate to. I wasn't sure whether——

The Court: Well, he wants you to stipulate—and see if I correctly state it, and then you will be in a position to say whether you are prepared to make the stipulation or not.

Mr. Bender: Yes, that was the only reason why I hesitated.

[7087] The Court: The funds that were withdrawn from New York banks by Mr. Klein, or that he caused to be transferred to Canadian banks.

Mr. Bender: You mean the corporate funds?

The Court: Yes.

(Mr. Bender nods.)

The Court: That was done by the means of certain checks.

(Mr. Bender nods.)

The Court: Mr. Bauman says that they do not have photostats in the various files of the reverse sides of those checks showing where they ultimately came to rest. He wants by documents from those files otherwise to prove where they came to rest in the Canadian banks. When he was prepared to move that these other documents for that purpose be admitted Mr. Kiendl said such motion was unnecessary, that he would stipulate as to each one of these checks.

Mr. Bender: I have no objection.

The Court: All right.

Mr. Bauman: Then that's that.

* * *

Mr. Donohue: May it please your Honor, [7088] just one matter. Government's in evidence 357 is an affidavit signed by the defendant Morris Alprin.

The Court: That was the one that Grumet was the notary on?

Mr. Donohue: Yes, your Honor.

The Court: Yes.

Mr. Donohue: Indicating the payment by him of moneys that he received from R. C. Williams & Company, some $14,000, to Kirby & Kirby and Kirby & Kirby, Limited. As I look back on the disposition of the motions to strike I think that every reference to Kirby & Kirby has been stricken by the Court. This is the only reference left. All of the testimony, all of the statements referring to it, all of the records have been stricken. I move your Honor to reconsider at this time the striking of 357.

The Court: Do you wish to be heard, Mr. Bauman?

Mr. Bauman: Yes, I oppose that. I think the exhibit is properly in the record, properly retained in the record and belongs in the record.

The Court: I am inclined to disagree with you in view of the fact that—and I think we [7089] did at the outset of these motions to strike say that

we would reserve and I would give everybody the opportunity when we had the whole crystallized picture in mind to retrace our steps. You have done so this morning with respect to these bank statements.

Mr. Bauman: I certainly have no objection to that procedure.

The Court: Yes.

I think that it imposes a very highly prejudicial situation. As a matter of fact honestly and technically if the jury were to adhere to the admonition to get in a corner and not think of a pink elephant they would say to themselves, "Well, who is Kirby & Kirby?" There is no probative basis for it any longer to remain. The only way they could determine that it was money flowing allegedly from Alprin to Klein would be by borrowing from something that they are not supposed to know about.

The motion is granted and Government's Exhibit 357 is also stricken.

* * *

[7091] Mr. Kiendl: If your Honor please, we would like to renew our motion at this point very briefly. The defendant Klein would like to renew the motion for judgment of acquittal under the fifth count of the indictment, now that the record has been substantially reduced both in size and in scope, and particularly on the ground that we suggested in connection with the Sealfon case on the principle of res judicata.

The Court: I don't think that case is applicable. I read that case very carefully and many times, particularly in view of the fact of your personal connection with it as one of the counsel, although not the case itself, a companion case. I think there is an entirely different situation. I think Justice Douglas, who I think wrote that opinion——

Mr. Kiendl: Justice Douglas did write it.

The Court: (Continuing) —clearly pointed out that only the two parties were involved in aiding and abetting and that only that one letter of the fact that the sugar was being used for sales to the Navy Yard, if I correctly remember it——

Mr. Kiendl: That is correct.

The Court: (Continuing) —that only that one letter was involved, and the reason—incidentally, [7092] that case is *sui generis* by the very statement in the first sentence—Justice Douglas pointed out very carefully that it is applicable solely to the facts involved in this case. I have read it and I am not persuaded.

I will tell you what it did give me the comfort of—the realization that I was right in dismissing the fourth count vis-a-vis the first three. And I think the case is very strong authority for that. But by the very same token I don't accept it as authority for the proposition that I am wrong in denying the motion for judgment of acquittal on the fifth count.

Mr. Kiendl: We are not stressing that case in the memorandum that we have prepared, but we

are stressing the case of *res judicata* so far as the facts are concerned, and we have a short memorandum to give to your Honor.

The Court: I would be very happy to read it. I will reserve decision on your motion.

Mr. Kiendl: In that memorandum we called your Honor's attention to what we think were inadvertent errors in your Honor's decision on the motion for judgment of acquittal in connection with the two matters that we have already discussed.

The Court: You have repeatedly alluded to [7093] the fact, and it may have been to the incompleteness of my opinion, you have repeatedly alluded to the fact that I felt that Klein was in income tax difficulties at that time. Of course I might have been more articulate and pointed out to you that as early as February, 1945, Mr. Haas gave him an opinion, in the last paragraph of which he cautioned him against certain performances by him as an officer of these corporations that might negate the legal avoidance that was contemplated by the parties. Now when I say Klein was in income tax difficulties I don't confine it to the jeopardy assessment. I mean that it may very well be found, in my view, and I know that you, with all the advocacy at your command, are going to disagree with me, that it may very well be found that Klein, with Haas' second tax opinion of February, 1945, in mind and the admonition contained in the last paragraph of that, that this all goes for naught if you

do so-and-so, knowing of his own actions subsequent to 1945 might have been in income tax difficulties, despite the fact that the breath of Uncle Sam wasn't t o close to the back of his neck.

Mr. Kiendl: Despite the fact that Uncle Sam has never proved in this case one iota of tax difficulty so far as Mr. Klein is concerned, not one word of proof.

[7094] The Court: Of course the ultimate of that will never be known until the tax court resolves the pending dispute between Mr. Klein and the Government.

Mr. Kiendl: And the investigators haven't testified in any sense that there was any tax difficulty of Mr. Klein.

The Court: Tax difficulty is a very broad word. I appreciate I used it. But to me, tax difficulty doesn't necessarily mean, and I think I pointed it out in my rather clumsy hypothesis about the Budd Lake House, that you don't have to actually owe the Government a dime in taxes to be guilty of the crime of attempting, and I use my colloquialism, to throw sand in the Government's eyes. If you and I agree that we will do anything, or commission or omission, that will prevent the Government from ascertaining whether or not I owe taxes, regardless of whether I do or not, I feel that spells out, if proved beyond a reasonable doubt and if proved limited to the extent to do just that, a crime under Section 371 of Title 18. And I think that is what the Government urges here.

Mr. Kiendl: Without defrauding, without impending, impairing, obstructing or defeating at all?

The Court: Well now, you beg the question. [7095] If you and I conspire, regardless of whether I owe a tax or not, that we will do something or we will not do something that we are required to do, that will prevent the Government from determining whether I owe a tax or not, that is a crime, because by our conspiracy we have impeded, we have impaired, we have obstructed, and my answer is that the Government might ultimately, after it has made its investigation, say, "You have a clean bill of health, you are a good citizen, good taxpayer, you meet your obligations and we have no complaint—you don't owe us a dime."

As a matter of fact they might even say, "You made a mistake, you overpaid and you ought to make a claim for a refund." I appreciate that that is almost an impossibility, but we will assume that it could happen. But if we conspired to prevent the Government from coming to that determination I say that is a crime under 371, regardless of whether I owe it or not.

Mr. Kiendl: Well, that gets back to the original argument that we——

The Court: I wanted to clear it up. When you say without impairing, impeding or obstructing, I say that conspiracy does impede, impair and obstruct [7096] the Government in determining ultimately that I don't owe a cent.

Mr. Kiendl: It doesn't defraud by impairing, impeding, obstructing and defeating. The statute says it must be a conspiracy to defraud.

The Court: The Hammer case defines defraud to be any dishonest act. They were very careful in that case to give defraud in 371 a very, very broad meaning.

Mr. Kiendl: I appreciate that.

The Court: And when you say without defrauding I assume you mean that the fact that the Government ultimately lost nothing—I say to you I can't accept that rationale that any dishonest act, any act to prevent the Government even from determining that I don't owe a tax——

Mr. Kiendl: Even if it didn't prevent the Government at all?

The Court: I say it tends to prevent the Government——

Mr. Kiendl: In this case there is no proof that they prevented the Government for one minute.

The Court: Well, whether an inference can be drawn from what proof is in, in no conspiracy case do you get direct proof, i.e., that Klein made a statement [7097] to Alprin in Haas' presence and Haas remained silent—boy, defraud the Government. You never get anything like that in a conspiracy case. You have to draw inferences from what they do, their actions.

Mr. Kiendl: Apparently I can't convince you about it and I shall argue that to the jury when the time comes.

The Court: I think I have indicated heretofore, whatever comfort it may be to the defendants, that I intend to instruct the jury that if they were to find any conspiracy other than the conspiracy charged in the fifth count they can't convict. It must be narrowly that conspiracy and that conspiracy alone. Anything else won't do. Furthermore, they can't find it solely on the relationship of the parties prior to June 1, 1946. I intend to charge them that.

Mr. Kiendl: I understand.

The Court: But beyond that, I decline to go.

I will be very happy to have your memorandum, and I intend to read the cases.

Mr. Donohue: Would your Honor extend that permission to me?

The Court: Yes.

Mr. Donohue: I have prepared one on the law [7098] and one on the facts.

The Court: I caution you gentlemen not to expect an adjudication of this before we go to the defendants' proof.

Mr. Kiendl: Oh, no.

The Court: I just won't have the time to do it. That will have to come later.

Does anyone else wish to raise anything?

Mr. Bender: I would like to be heard, your Honor. It will only take a few minutes, if your Honor will indulge me.

The Court: Yes.

Mr. Bender: I would like to talk to you about two things, if I may. First I would appreciate it if I could adopt the position taken——

The Court: I can assure you that if Mr. Kiendl persuades me that there should be a judgment of acquittal against Klein, it will go all the way, because I certainly couldn't see holding one way on one and another way on the other, because they are all in this or they are not.

Mr. Bender: I haven't read Mr. Kiendl's brief, but I have Mr. Donohue's brief, with which I am heartily in accord, and it expresses some of the thoughts [7099] I have expressed to the Court.

The Court: I will consider these briefs in total as being submitted for all three defendants.

Mr. Bender: I am more concerned at the moment, your Honor, with two things, and I think it is important to discuss this now because of your Honor's position with regard to the purport of all of the evidence that remains in the record prior to June 1st, or to June 1st, 1946. I think the Government has contended and I think your Honor has been persuaded, to whatever limited extent your Honor has, but at least the Government has contended that they can go in front of the date set forth of the commencement of the conspiracy to show acts and transactions of the parties as admissible on the question of the intent with which the conspiracy was effected as charged in the indictment, and they cited the Dennis and the Witt cases.

Now I think it is important to point out that in order for any evidence whatsoever prior to June 1, 1946, to be admissible on the question of motive or intent, the motive or intent with which those acts were done must have a similar relation or must be

in effect criminal in order to have some probative force on the wilfulness or the intent with which we are [7100] charged on the conspiracy in the indictment.

Do I make myself clear in that respect?

The Court: You do indeed.

Mr. Bender: Now certainly as far as every one of the acts is concerned which antedate June 1, 1946, the defendants having been acquitted as to the criminality at least under the first four counts of those acts, none of those acts can in anywise be said to be tainted with any specific criminal motive so as to be relevant to the motive or intent that has to be proven on the fifth count. And I have in mind a few cases, Second Circuit cases specifically dealing with the type of similar act that the Second Circuit Court feels is probative on the question of intent of the crime charged.

May I point them out to you, your Honor?

The Court: Yes.

Mr. Bender: One case is United States v. Rossi, 182 Fed. (2d), 293 (1950 case), and while it is not a conspiracy I submit that the same rule governs whether it is a substantive offense or a criminal offense. And this is what the Court says at 293:

> "In order to prove that he had understood the question in its broader scope, the prosecution put in evidence that upon five or [7101] more other occasions Rossi had suppressed the conviction and the arrest in answering similar inquiries; and it is the admission of this evidence

that is the principal error urged upon the appeal. It was admissible under the well-estabilshed doctrine that, when one element of the crime charged is that the accused must have a specific knowledge or intent, other occasions of similar objective conduct by him are relevant and admissible. It is a condition upon this doctrine, at times not understood, that there must be some basis for inferring that the objective conduct upon the other occasions used as evidence was probably accompanied by the specific knowledge; for it is only when that is so, that they form a legitimate basis for believing that the conduct charged was also accompanied by the same knowledge. The necessity of this is obvious; because a cumulation of earlier occasions, no matter how many, upon each of which there was no probability that the added element did accompany the objective conduct, would not in any degree whatever help to prove its presence upon the occasion charged."

[7102] Now in United States v. Abdallah, 149 Fed. (2d) 219, the Second Circuit in applying the same theory distinguished the case of McLafferty v. United States, 77 Fed. (2d) 715, which was relied upon by the defendant to keep similar acts out of evidence, and they said as follows:

"For there there was a definite showing that the issuance of the other prescriptions was lawful, while here a great deal indicated that the pre-

scriptions were unlawfully issued, which made them proper evidence of bad faith."

Now obviously, if everything——

The Court: Mr. Bender, may I interrupt and suggest that you find me a case where they say that with respect to conspiracy?

Mr. Bender: Well, may I say this. If we are dealing with the question of motive and intent, your Honor, which has to be proved, whether it is a substantive offense or conspiracy, the similar-act doctrine is the same. There is no distinction between conspiracy and substantive offense. And if your Honor will allow me, I will try to find such a case.

The Court: I will allow you to.

Mr. Bender: All right. The second point I [7103] want to make is this, your Honor. We have gotten to the point now, as Mr. Kiendl said, where we can see what evidence is in the record on the fifth count. And just as it was the position when the Government rested, I contend, and I contend here honestly and sincerely, that without regard to anything else as far as the defendant Haas is concerned I say that the Government has attempted to prove a separate conspiracy between the defendant Klein and the defendant Haas with regard to this $35,000 paid to Compania La Ribera. It is clear in the evidence that there isn't any relationship whatsoever between that payment to Commercial La Ribera and the other payments as referred to in the fifth count. As a matter of fact, it is clear that Haas was not a party

to the formation of that corporation in 1946 and that it is something that he acquired much later on.

Moreover, the Government's evidence indicates that it was in the nature of a loan, and there is no evidence to contradict that, whereas the evidence as to the other things is conflicting.

Now the importance of that is this, your Honor, that if the Government, as we contend, has proved a separate or has attempted to prove a separate conspiracy between the defendant Klein and the defendant Haas, [7104] then on the basis of your Honor's determination that the fifth count conspiracy ended when the last return either by Mr. Alprin or Mr. Koerner was filed in 1952, then by that rationale the conspiracy or the second conspiracy allegedly between Mr. Klein and Mr. Haas ended when Mr. Haas filed his 1949 return in 1950, in which event, as far as that conspiracy is concerned, it would have been outlawed by the statute of limitations.

Now in the United States v. Siebricht, 59 Fed. (2d) 976, which is a Second Circuit Court decision, there the Government charged in one conspiracy, a single conspiracy, what it actually proved to be two conspiracies. And one of the conspiracies which it proved, although it didn't allege, the Circuit Court held was outlawed by the statute of limitations, just as we contend the second conspiracy allegedly between Klein and Haas took place, and the Circuit Court held that that was a fatal variance, that you could not join in a single conspiracy two conspiracies one of which is outlawed by the statute of limitations.

And we urge upon your Honor to read the Siebricht case. And if as we contend from the evidence in this record that the Government is allegedly proving, as far as the one thing is concerned, the $35,000 paid [7105] to Compania La Ribera, a separate and distinct conspiracy, that case, U. S. v. Siebricht, holds that that is the fatal variance, and as far as that particular conspiracy is concerned the motion for judgment of acquittal must be granted on that. And the respect that it has to the other alleged conspiracies I think your Honor might well find that there are fatal variances on that, too.

That is all I wanted to say.

Mr. Kiendl: Your Honor, I have just one short suggestion, if we have another moment.

The Court: Surely.

Mr. Kiendl: In connection with Government's Exhibit 253, which was the income tax return of the defendant Koerner for the year 1952, your Honor will recall that you admitted that by necessity and we move to strike it out again and your Honor affirmed your ruling, In connection with that your Honor at page 3268 instructed the jury:

> "If I were persuaded that that prejudice would result, I would have excluded the document entirely. However, I believe that I can satisfactorily and indelibly impress on your minds that in receiving this document for whatever value it has, if any, I do so only only—on the fifth count as to [7106] the defendant Klein, and for no other purpose whatsoever.

"Is that clear to you?

"(The jury answers in the affirmative.)"

Now we submit that in admitting the income tax return and limiting it to that particular purpose is to suggest to the jury that in some way Mr. Klein is solely responsible for it, and now that the motions to strike have been made we suggest to your Honor that you instruct the jury when it convenes on Monday that if that income tax return is to continue in the case it is to continue in the case as against all the defendants. And the same is true with the Roer income tax return for the year 1950, that was admitted solely as against the defendant Klein.

The Court: Well, of course the reason for that is that these things came into being subsequent to the commencement of the conspiracy. Mr. Bauman didn't move that they be received as against the other two defendants.

Am I correct in that assumption?

Mr. Bauman: That is exactly right, your Honor.

The Court: Let me think about it. And would you be good enough to remind me about it again before the [7106a] jury is brought in on Monday.

Mr. Kiendl: I will, your Honor.

The Court: All right, gentlemen. We will suspend now.

(Adjourned to Monday, July 18, 1955, at 2.15 o'clock p. m.)

* * *

Denial of Renewed Motions for Acquittal on the Fifth Count

July 20, 1955, 2:15 o'clock P. M.

[7113] However, my attention has been directed to one thing and I would like you, Commissioner Donohue, to keep this in mind: Mr. Kiendl placed his motion for a directed judgment of acquittal on the fifth count on the record with respect to Klein.

[7114] Now, you submitted two briefs, one a summarization of testimony and the other on the law on a similar motion as to your client Alprin. But I do not find in the record any reference thereto of your having formalized that motion specifically on the record, and I would remind you to do so so that the record will be complete.

Mr. Donohue: May I do so at this time, if it pleases you Honor?

The Court: All right, if you will.

Mr. Donohue: May I at this time move for a judgment of acquittal with respect to the defendant Morris O. Alprin on the fifth count of the indictment on the basis of the authorities which have heretofore been submitted to the Court?

The Court: Decision reserved, and I will give my decision on that motion when I give my decision on the similar motion by Klein.

Then we stand in adjournment until 2:15 tomorrow afternoon.

* * *

July 21, 1955, 10:30 o'clock A. M.

[7140] Defendant Klein's motion for judgment of acquittal on page 7091 of the minutes, defendant Alprin's motion for judgment of acquittal on pages 7097 and 7114 of the minutes, defendant Haas' motion for judgment of acquittal on pages 7098 and

7105 of the minutes, and all defendants' motions for judgment of acquittal reflected on page 7099 are severally denied.

I also rule and will so instruct the jury at the appropriate time when these exhibits are summarized that Koerner's 1952 return, i.e., Government's Exhibit 253 and Roer's 1950 return, i.e., Government's Exhibit 348, both heretofore received as to the defendant Klein, are to be received as to all three defendants, and when the jury receives the summary of these two exhibits, the Court will interrupt [7141] the reading of the summary to so instruct the jury.

Let the record show, of course, that the receipt of these two exhibits against the defendants Haas and Alprin are over the objection of said defendants.

* * *

July 25, 1955, 2:15 o'clock P. M.

(The jury entered the courtroom.)

* * *

[7153] The Court: Now I suspect—I have never been a member of a jury myself—but I suspect that jurors not initiated in the technicalities and to them sometimes the nonsensities of a lawsuit conjure up in their minds reasons for things that happen that they don't know about. I don't want to appear to be the woodshed philosopher who tell you, "This hurts me more than it hurts you." But the truth of the matter is that the period of time that you were unable to participate in the trial was of necessity, and counsel and the Court worked very hard during that period. I mean I daresay we must have put in, all of us, at least twelve hours a

day and going through week-ends, although we were not in the court during all that time. And I propose to give you the net result of those labors, because ultimately what we were working for was directly concerned with your function in this trial, i.e., your trial of the facts presented by the evidence. And I suppose the best way to tell [7154] you about it would be to remind you as I have already told you, but now probably in a little greater detail, that when this prosecution commenced, when this trial commenced, there was an indictment containing five counts. Now a number of defendants were named in the first four counts and those defendants but two were named in the fifth count.

The first three counts—and this is the last time that you will hear anything about them because, as you will learn, they are no longer in the case as is the fourth no longer in the case—the first three counts charged that certain defendants named therein, either as principals or aided and abetted by other defendants named therein, in the year 1944 in the first count, 1945 in the second count, 1946 in the third count, violated a section of the law known as 145(b) of Title 26—that is the Revenue Code of the United States—in that they attempted to evade the payment of their income tax, certain of the defendants for the years 1944, 1945 and 1946.

The fourth count charged these same defendants with a conspiracy to attempt to evade.

Now the attempt to evade is what is known as the substantive or the active count. The fourth [7155] count was the conspiracy count.

Now the whole theory on which those first four counts rested was that these corporations that collected the proceeds of the sale of the Harwood's Whiskey et cetera in the years 1944, 1945 and 1946 were a sham, they were a fake, they were a screen, they were a blind. That was the Government's position: that they were set up for one purpose only and that was to enable the defendants charged in the first four counts with evading and attempting to evade that which would have been their normal individual income in the years 1944, 1945 and 1946.

In other words, the Government's theory was that this money that was made was made by these defendants in those years and they should have reported it and paid it, but that they set up these corporations in order to act as a screen, and then ultimately when the trading was over in Harwood that they liquidated the corporations and in 1948 Hyman Klein as the United States resident defendant of the principals filed a return for the year 1947 in which he paid a tax at the rate of a capital gain rather than having paid what the Government said was on his income during the years 1944, 1945 and 1946.

[7156] Now there are certain legal principles by which those things are tested, and without going into the degree of details that I would go into in a charge if you were still concerned with those counts, I will tell you in just a general way that every corporation, every single corporation, is a fiction. It is a man-made device. It is not a human being although it is operated by human beings.

And these fictions are judged by certain very well settled standards. The form of a corporation and its activity. What it does. The adherence to accepted corporate functions.

I dismissed the first four counts—when I say "dismissed" that is a colloquialism. What I really did was on the defendants' motion opposed by the Government I granted the motion of directing a judgment of acquittal. In other words, I took over your function, as I have the right to do under the law, and I did so upon the basis that I was persuaded that no reasonable person on the mass of evidence that was brought in here on what these corporations did and how they functioned—that no reasonable person could come to the conclusion that they were a sham. They adhered in great measure, overwhelming measure, to [7157] all of the formalities and functions that are normally employed by corporations in conducting corporate business. And on the basis of that belief I dismissed the first four counts, because the only way that the Government could succeed on any of the first four counts was to establish the fact that these corporations were a sham, because the only way the Government could succeed on the first four counts would be to establish that this was the income of the individuals rather than the income of the corporations, and that the corporations were a sham. Having concluded, as I did, that on the evidence adduced in the Government's case no reasonable person could find that they were a sham, I then came to the necessary corrolary, that

their income was their own, not that of the defendants named in the first four counts and therefore there was no crime in their not having reported in 1944, 1945 and 1946 as individual income and there was no attempt to evade in those years and there was no conspiracy to attempt to evade.

Now the first four counts from now on are out of this case. You will deal now with only the fifth count. The fifth count is predicated or bottomed on a different section of the law. It [7158] is predicated on Section 371 of Title 18, and that is a section which makes it a crime to defraud the Government by conspiracy.

Now I want to emphasize now with all of the power at my command that which I mentioned to you heretofore. The mere fact that I did not dismiss the fifth count is not to be taken by you, is not intended by me to be, nor is it to be taken by you as an indication by me of guilt on the fifth count.

But I did believe that under the statute there involved the matter should go to a jury for its determination. But I emphasize again and again to you that the mere fact that I did not throw out the fifth count also is not to be taken by you that these defendants thereby are more likely to be guilty than they are to be innocent. Please, I want you to keep that in mind. I express no opinion on their guilt under the fifth count.

Now of course here is a record of some seven thousand pages. There were introduced into evidence some—I daresay in excess of 400 exhibits.

Statement of Court to Jury After Striking Evidence

Well, all of that testimony and all of those exhibits came in under an indictment containing five counts, but [7159] now we are proceeding on one count alone, and that meant that it was the obligation of counsel and the Court to take that entire record word by word and every one of those 400-odd exhibits and strike out those that did not deal with the fifth count, because you must put yourselves in this mental frame: From this point on you are to consider only that which would have come to your notice if you had only heard about the fifth count and had never heard about the first four, because the case is different now. It has been narrowed. And so the process that we went through where I said it hurt us more than it hurt you was the process of going through that entire record and eliminating all of the testimony that could not be received on the fifth count and the fifth count alone. In other words, any testimony that was received in the opinion of the Court only on the first four counts will have to be eliminated.

The same with exhibits. Many, many, many exhibits were stricken out because when they were received we were dealing with an indictment which had five counts, but now we are dealing with an indictment that has only one. And so any exhibit that was received that had no rational probative value to the [7160] fifth count had to be eliminated. And so we went through this process, page by page, exhibit by exhibit, until we finally completed our tasks.

But then as in these situations we were confronted with a practical problem. We didn't do this job for our own amusement. We did it with a purpose, the purpose being to give to you, the triers of the facts, the net residue, that which remained in the case as to the fifth count after all the rest had been stricken.

And so after all the work had been completed—the spade work, the analysis, the determinations—we then had to resolve down to a method of preparing summaries of that which remained, and today and possibly into tomorrow we will be giving you the summary of the testimony and the exhibits that still remain in evidence.

[7161] If anything remains in your mind from what you heard during the three months that the Government put in its proof that is not alluded to in the summary of exhibits or in the Court's summary of the testimony, you may not use that in considering or in deliberating on the question of the guilt of the defendants or innocence of the defendants on the fifth count.

One of our very brilliant Circuit judges, Judge Frank, has characterized that process, with which he has been quarreling for years—but it is the best we have been able to conceive—he has characterized that process in a very pungent way, and I think you probably will understand a little better when you hear that he says it is like putting somebody in a corner and telling him not to think of the pink elephant. Of course, you realize if I put you in a

corner and say to you "Do not think of the pink elephant," the one thing you are probably going to think more about than anything else is a pink elephant. Yet it is an obligation upon you by law to do so. However yours is not going to be such a difficult task, and I will tell you why. I do you the injustice of gauging you by my own [7162] standards, and I don't remember all of the testimony and all of the exhibits that went in in the Government's three months of proof. I dare say that there isn't one of the jury that remembers every bit of it.

Therefore, you do suffer less a disadvantage than a person who may be in a trial as a juror only for two or three days and things are fresh in mind.

What we are going to do is this:

We are starting off fresh, so to speak, on the fifth count today. The process will be this:

A representative of the United States Attorney's office will get up and read to you a very brief summary of each exhibit which has not been stricken. After that has been concluded, a representative of defense counsel will get up and read to you a brief summary of the defendant's exhibits that have not been stricken.

In other words, the exhibits that you are told about now are the only exhibits from the Government's case—of course, more proof is going to come in from the defendants. I don't know whether it will be exhibits, testimony or what, but I am speaking [7163] now only of the Government's case, and the Government rested, up to the point the Government

rested—those are the only exhibits that you will be permitted to consider in connection with the count that now remains before you, the fifth count.

I may say this: That the summaries of the exhibits were agreed upon as to the language employed by counsel for the Government and the defendants. That was their share of the summary preparation. They were able, I may say—and I do them great credit, which they are entitled to—with the exception of three slight items there was no disagreement as to how to describe a given exhibit. Of course, I want you to understand this, and I will tell it to you again in my charge, that ultimately, when you come to deliberation, you may have any one of these exhibits that was not stricken and any exhibit that goes into evidence during the defendants' case or in the Government's rebuttal, if they have any, that is your right, but you may not have any exhibit that was stricken, just as though you had never known about it.

When we came to the problem of summarizing testimony, that was a chore that the Court had to [7164] undertake, because we recognize that there might be difficulty in counsel being able to agree on how to objectively state a translation of something that somebody said from the stand. Therefore, with as much objectivity as I have at my command I took all of the testimony and similarly made a summary of that which remained in evidence. After you had been read the summaries of the Government's and the defendants' exhibits, I will

then undertake to read to you my summary of the testimony that still remains in the case.

With respect to this fifth count, it charges that on a certain day, June 1, 1946—is that the correct date?

Mr. Kiendl: Yes.

The Court: (Continuing) On June 1, 1946, the defendants therein named entered into a conspiracy to impair, impede, obstruct and defeat the function of the Department of the Treasury in the collection of income taxes.

Now, the starting date is June 1st, 1946. I want you to catalog in your minds that date, because evidence will come in two categories. There will be evidence of things that occurred before June 1st, [7165] 1946, and evidence of things that occurred after June 1st, 1946.

The evidence—and when I say evidence, I am referring not only to exhibits but also to testimony in the Government's case—the things that occurred prior to June 1, 1946, are given to you not because they are part and parcel of the conspiracy charged, because the Government says that conspiracy started on June 1, 1946, but you must have a certain amount of the background material in order to understand and intelligently approach the conspiracy which the Government charges occurred.

So, for background, in order to understand the relationship of the parties, their dealings and so forth, this proof has been allowed to remain in of things that occurred prior to June 1, 1946, proof

of things that occurred after June 1, 1946, has in the main been confined to the defendant who had direct connection with it.

However, I want to point out to you that in the fifth count Koerner and Roer are no longer defendants. They were named by the Government only in the first four counts, and they are out of the case. I have permitted certain evidence to [7166] remain in where Koerner and Roer had a direct connection, despite the fact that they are no longer defendants in the case, and that is the only evidence that I recall at the moment that occurred after June 1, 1946 that did not have a direct connection with the defendants still in the case. Of course the three still on trial before us here are Mr. Klein, Mr. Haas and Mr. Alprin.

After the Koerner statement and Roer statement to investigating agencies, even though they occurred after June 1, 1946, I have permitted them to remain in evidence as against all defendants. Similarly as to the Koerner 1952 income tax return and the Roer 1950 income tax return, I have permitted them to remain in evidence as to all defendants.

Also, when we come to it, you will note when Baker was examined, he testified to certain conversations that took place with Mr. Roer, and those were after June 1946, and those remain in evidence as against all defendants.

I believe I have covered in a general way everything that should be covered. However, if [7167]

counsel for either the defendants or the Government wish to call my attention to any particular phase of this process that they want me to discuss, I will be very glad to hear from them.

(No response.)

The Court: I accept your silence as an acknowledgment that nothing occurs to you that did not occur to the Court.

Mr. Donohue: You are correct, your Honor.

Mr. Bauman: I am sure this was an inadvertence on your part, your Honor, but in referring to the fifth count your Honor referred to June 1st, and I would merely call the Court's attention to the usual language of "on or about June 1st."

The Court: On or about June 1st, yes. I am working on a general scope here, not as I would in the charge.

With that background and those admonitions, I am going to ask now if the Government would be good enough to summarize to the jury the Government's exhibits that were not stricken and which constitute the only Government exhibits that you may consider in connection with the count now on trial before you.

[7168] (Mr. Bauman read a description of Government's exhibits remaining in evidence.)

Mr. Kiendl: With reference to Exhibit 5, is the word "supplementary" there, Mr. Bauman?

Mr. Bauman: I don't see it.

The Court: It is not in mine.

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*Summary printed at III, 1381 et seq, *infra*.

*Summary of Government's Exhibits Remaining in the Record**

Mr. Bender: I am wondering, your Honor, if we could dispense with the record on this?

The Court: Oh, yes, I don't think this need go into the record.

(Mr. Bauman resumed the reading of a description of Government's exhibits remaining in evidence.)

* * *

[7169] (Mr. Bauman concludes reading of list of exhibits to the jury.)

Mr. Donohue: If it pleases your Honor, before the defendants' counsel read defendants' exhibits, may I say to your Honor that your Honor correctly stated to the jury that with respect to a description of the exhibits just read by Mr. Bauman there was almost unanimous accord between counsel which very readily was resolved by the Court with respect to three rather unimportant matters. Fearing that perhaps the jury might get the impression from that statement that the defendants [7170] acquiesced and agreed concerning the admissibility of these documents and having in mind that counsel had moved the Court to strike many on the ground that they were not either relevant, pertinent or material to the fifth count, I know, if it pleases your Honor, move to strike, since I take it this reading is in the nature of introduction in evidence—I now move to strike such exhibits as were read to the jury by Mr. Bauman that heretofore were asked to be stricken by myself as counsel for Mr. Alprin.

Court's Summary of Testimony Remaining in the Record

The Court: Denied.

Mr. Bender: I join in that motion.

Mr. Kiendl: May we have the same?

The Court: Yes.

All motions denied.

Mr. Kiendl: (To the jury) This is a description, ladies and gentlemen of the defendants' exhibits that remain in evidence. (Reading.)*

[7171] Mr. Bender: The defendant Haas will move to strike the defendants' exhibits which the defendant Haas previously moved to strike, namely, on the same basis, that they were not probative or relevant to any issue in the fifth count.

The Court: Denied.

To recapitulate, ladies and gentlemen of the jury, you have now had read to you a summary of all the exhibits that remain in the case. If perchance you have a recollection of any exhibit not included in that summary, completely erased from your mind because the Court has ruled that it is not rationally probative of any matter involved in the fifth count, which is the only count now involved in the trial.

I want to make it clear to you that the mere fact that counsel for the defendants undertook to sit down at the behest of the Court with the Government counsel and agreed on language describing these exhibits is not to be undertaken by you or understood by you to be a commitment of any kind by any defendant, that an exhibit which he moved to be stricken and which the Court declined to strike is [7172] accepted by him as probative value.

*Summary of Defendants' Exhibits is printed at pages 1380, et seq.

All that the attorneys did was to agree on language describing the exhibit after the Court had indicated that the exhibit would remain in evidence and not be stricken.

I would remind you again not only with respect to these exhibits but also with the testimony that I am about to engage in a discussion of, that you keep that definitive date of on or about June 1, 1946, in mind. I told you heretofore that of the exhibits, Koerner's 1952 return, which is Government's Exhibit 253, and Roer's 1950 return, which is Government's Exhibit 348, although subsequently dated to on or about June 1, 1946, because Koerner and Roer are not longer in the case, have been received as against all defendants. I would add to that something which I did not tell you before, and that is that Government's exhibit 396, which is the bank records of the New York branch of the Bank of Nova Scotia in reference to Compania Exportadora Fernandina, S.A. are in a similar category, although they came into being subsequent to June 1, 1946, and are received as to all defendants.

The only two items that were not summarized [7173] for you, you will recall, were the Koerner and Roer statements, I believe, where it was indicated—no, I am mistaken about that. There were two statements that were received as exhibits, where it was indicated that the Court would summarize them, and those were the Koerner statement, Government's Exhibit 249, and the Alprin first state-

ment, Government's Exhibit 264, and the Alprin second statement, Government's Exhibit 265.

You did not get a summary of those, although they were received as exhibits having been signed by the parties, the summarization was left to the Court because they were in the nature of testimony.

In addition to these exhibits, there came into this case other types of proof. You have heard about the exhibits. You know now those which you are permitted to consider and the others that you are not.

There were certain stipulations made in the course of the trial, and you will recall that I told you at various times a stipulation was a proven fact. If the parties agreed to it, then there was no caviling about it, it was stipulated by both sides and that was that.

[7174] In the course of the trial, certain stipulations were made, but when the four counts were stricken, naturally some of the stipulations that had been made addressed themselves to the counts that were stricken and therefore certain stipulations have to be stricken out. Those stipulations that were stricken, I will give you very briefly, and, by the way, by way of preface, while you gentlemen of counsel had the opportunity of sitting down and agreeing on the language employed to describe documents in evidence, you have not had the opportunity or reviewing what the Court has said testimony purported to convey. So whether you desire it or not, I feel it incumbent upon myself to place

upon the record the objection of every defendant to any summarization by the Court of the import or impact or meaning of language. I think that should save to you all rights that might arise under the circumstances, unless you want to add something to it. If you do, you are at liberty to think about it and you will certainly be given that opportunity at the conclusion of the reading of my summary.

However, I do want the record to clearly [7175] show that you have not agreed that what I say a witness said is what he actually said. I think this is a good time, incidentally, to address this observation to the jury, which I neglected to do earlier, when I paraphrase, so to speak, a witness' testimony, I tell you what I think the witness said. If your recollection of this testimony or if at the proper time when, as is your right, you can have that testimony not stricken read back to you from the record, if you need it, if your construction, your translation or interpretation or impression of what that witness said differs from mine, you are to completely reject mine. You are the judges of the facts, and I will tell you so again in the charge, but I want you to know even as I read my summary of testimony, if your recollection of what a witness said is different from what I say he said, you do not have to accept mine because I am the judge. You are the judges of the facts.

This is only being done as a technique to let you know what is out and what is in. However, the ultimate determination, at the appropriate time if

you want any of the testimony read back, you may [7176] have it. If your conclusion is different from mine, you follow your own conclusion, never mind what I said the witness said. It is what you think the witness said that counts.

Getting back to the stipulations, the stipulations that were stricken—I will interrupt myself again.

Do counsel want me to give the page numbers of these various things throughout the record so they can have ready reference? They will be available at any time if you want them. I have them all keyed by page numbers. I won't have it done unless I am asked.

Mr. Kiendl: Your Honor is now giving a list of the stipulations that were stricken out?

The Court: I will give both. Any summary that I give, I can give you the page number of the record, approximately where it started, so if you have any doubt and you want the page number, do not hesitate to interrupt and I will be glad to give it to you. However, I won't read it unless you ask for it. Is that understood?

Mr. Bender: Yes.

Mr. Bauman: Yes.

[7177] The Court: Only in this one instance am I referring or summarizing that which was stricken, and my reason for that—and that is with respect to stipulations—and my reason for that is because a stipulation takes a little bit different aspect than testimony. Testimony is open to construction by the jury. A stipulation is an agreement of a fact that is

conclusive. However, I think you will see after I have given the very brief summary that no violence is done the defendants by the fact that only in this case I am telling the jury that these stipulations were stricken.

[7178] A stipulation by Klein as to his relationship to certain salesmen, a stipulation by Roer as to his relationship to certain salesmen, and a stipulation that certain exhibits were typed on the same typewriters. Those were the stipulations that were stricken. You can forget about them. They are no longer in the case.

Now we come to the stipulations that were not stricken. There was a stipulation that Government's Exhibit 16-C, which was an allocation sheet, Exhibit 15-E, an invoice of H. Harvey Company, Ltd., were typed on the same typewriter in the office of H. Harvey Company in Baltimore, Maryland.

There was a stipulation that was not stricken, that Government's Exhibit 13-G——and I interrupt myself again. Is this all going in the record, and you want it in the record?

Mr. Bender: We certainly do, your Honor.

The Court: There was a stipulation that Government's Exhibit 13-G, an invoice similar to those typed by Mrs. Lowy, when she was Klein's secretary, from data obtained from Duncan Harwood invoices supplied to her by Mr. Rokoff, and Government's Exhibit 15-A, an invoice of H. Harvey Company, Ltd., [7179] were typed on the same typewriter in Klein's office.

There was another stipulation not stricken: That Government's 117-B, (a form or sample letter from which Koerner copied a letter sent to Glueck in Honolulu on April 6, 1946), Government's 117-C (a letter from Alprin to Koerner, dated April 5, 1946 sending Koerner a form letter, Government's 117-B), Government's 118-B (a form or sample letter, unsigned, but intended to emanate from R. C. Williams & Co., Inc. on its letterhead, dated August 2, 1945, addressed to Agencias Destiladores re Harwoods Gin and asking for terms upon which the same might be purchased to be resold to retailers handling Harwood's Whisky) and Government's 119-B (a form or sample letter unsigned but intended to emanate from R. C. Williams & Co., Inc. on its letterhead, dated August 2, 1945, addressed to Agencias Destiladores inquiring as to the basis upon which Harwood's Whisky could be sold to monopoly states)—those Government's exhibits, 117-B, 117-C, 118-B and 119-B, were all typed on a typewriter in the office of Morris O. Alprin in New York City.

Another stipulation not stricken: That Government's 13-A, B, C, D, E, F, H, I, J and K (invoices similar to those typed by Mrs. Lowy, when she was Klein's [7180] secretary from data obtained from Duncan Harwood invoices supplied to her by Mr. Rokoff), Government's 153 (a letter from Agencias Destiladores, signed by F. Gurrie, addressed to Koerner at Williams approving appointment of certain salesmen) and Government's 18 (a

letter from Ramsey Scott, letterhead impressed, to Koerner at Williams re assumption of Agencias agreement with Williams by Ramsey Scott)—these, Government's 13-A, B, C, D, E, F, H, I, J and K, 153 and Government's 18, were all typed on the same typewriter in Klein's office in Baltimore, Maryland.

Another stipulation not stricken: That the original of Government's 379, consisting of photostatic copies of Rokoff's memorandum records of Regan Potter & Company, Ltd., was a bound book and not loose-leaf as the exhibit is.

And finally one other stipulation was not stricken: That the original of Government's 380, consisting of photostatic copies of Rokoff's memorandum records of Tivoli Trading Co. S. A. was a bound book and not loose-leaf as the exhibit is and pages missing from the exhibit were blank in the original and not photostated.

Now that concludes the stipulations still in evidence before you on the fifth count.

[7181] From there we will go to a consideration of testimony.

Mr. Kiendl: Your Honor, may we interrupt?

The Court: Surely.

Mr. Kiendl: To say that there is one other stipulation or two other stipulations.

The Court: Well, they must have escaped me. Which are you referring to?

Mr. Kiendl: A stipulation regarding the claim that none of the money in these drafts were Klein's money.

Mr. Bauman: I think we ought to discuss that out of the hearing of the jury.

The Court: Well, we will hold that in abeyance and discuss it after the jury adjourns for the night.

Mr. Kiendl: Can I give your Honor now the folio number?

The Court: Well, will you hold it and we will discuss it after I dismiss the jury.

Mr. Kiendl: All right.

The Court: But I will start with my analysis of the testimony and we can always pick that up whatever the conclusion is.

Mr. Kiendl: All right.

[7182] The Court: Now then, we now come to testimony, and of course by that we mean that which was said orally in your presence by witnesses on the stand, and also those statements that were not received as exhibits, and while they were read from transcripts made by the stenographers who took the minutes of those statements, they were received as though the stenographer was on the stand and read it from his or her notes. Now that is what we mean by testimony.

I have taken the statements which were not received as exhibits but which were supposedly read by the scriveners here in court and segregated them, and we will take all statements together, those which were by way of testimony and those which were by way of exhibits, we will take those all after I conclude my dissertation about the other testimony.

Court's Summary of Testimony Remaining in the Record

Now as to the testimony the first thing I want to tell you is that the testimony of a number of witnesses was entirely stricken out. And so you can completely forget anything that you heard from any of these witnesses:

Kenneth H. Swift,
Herman E. Case,
Robert W. Beal,
[7183]
Glen Logan Clark,
Joseph O. Berlowitz,
Joseph Abrams,
Murray A. Schutz,
Ernest L. Donato,
Ralph B. Cohan,
Charles E. Ruck,
Morris B. Older,
and John R. Green.
Thomas Donaldson,
Julius G. Barkin,
Alex J. Miller,
David J. Davis,
John M. Menzies,
Ricardo Moran,
Victor L. Armitage,
John J. Walsh,
Raymond L. Brewster,
Fred M. Miller,
Harry Heath Allen, Jr.,

Now it may surprise you to realize that we listened to so many witnesses. We listened to a good many more. If you have perchance forgotten the testimony of any of those whose names I just read, all the better, because you are not supposed to know about it in any event on the fifth count.

Now we have a couple of witnesses whose testimony was retained in its entirety. I am not going to summarize that, but I am going to tell you that at the appropriate time if you want refreshment from the record on what those witnesses testified to you may have it.

There were only two whose entire testimony remains in the record. They were Renee I. Bennett—and I identify her simply to you as Mr. Haas' former [7184] employee—and the other was Dr. Alberto Valverde, whom I identify to you as the Cuban lawyer who formed the corporations for Alprin, Koerner and Roer (those of Alprin being Alprin's Exhibits EI, EJ, EK and EL still in evidence).

Now those two witnesses, their testimony remains in entirely. As to the remainder of the witnesses some remained in and some were stricken out, and I have undertaken to summarize that which remained in, and the first we come to is Jules Jacobs, and that you may orient yourselves as to where the testimony occurred I will tell you whether it was in direct or in cross or in redirect that he testified as I say he did.

Jules Jacobs' direct not stricken:

At a conference, following a prior meeting, Alprin proposed the R. C. Williams Co., Inc.-Agencias Destiladores S. A. contract be separated into two documents to which Klein agreed and Jacobs was deputized to draw the contract which is Government's 4 and 5 in this trial.

At the second conference at which Klein was present, Alprin's compensation was discussed. It was agreed that Alprin's fee be a commission of 60 cents a [7184a] case.

That is all of the Jacobs' direct testimony that remains in the record.

[7185] Now we come to Jacobs' cross-examination not stricken which remains in the record, and that is the following:

After first testifying on cross-examination that Mr. Klein was present at only one conference before the Williams-Agencias contract was drawn Jacobs denied having so testified and stated that there were two such conferences.

Alprin, at a conference with Jacobs,—mind you this is merely what Jacobs is supposed to have testified to; I am paraphrasing his testimony in brief form and this goes through all this summary that I give you; not that it is all that Jacobs testified to, but it is all that each particular witness in my view testified to.

Now going back:

Alprin, at a conference with Jacobs, showed Jacobs Haas' tax opinion, Government's 8, and left it with Jacobs who read it over, studied it, thought it sounded right, and did not disagree with it. He later told Alprin it looked all right and did not tell him anything was wrong with it or that he disapproved any part of it nor did he take exception to any part of it.

[7186] Jacobs also testified on cross:

As a result of Jacobs' conference with Alprin at which the Haas opinion, Government's 8 was produced, it was later, after Jacobs had examined the Haas opinion, arranged that Jacobs would prepare the Williams-Agencias contract changed in accord-

ance with the Haas opinion and that Jacobs would prepare Government's 4 (the main document) and Government's 5 (the supplemental letter) and Williams' separate order for 100,000 cases of whiskey.

Jacobs also testified on cross that Jacobs checked some of the authorities cited in Haas' opinion and found them correct. He later told Alprin that he had no fault to find with the opinion and that he was satisfied that Williams was not involved.

Jacobs also testified on cross that Government's 7 (Williams' order to Agencias for 100,000 cases of Harwood's) is the separate instrument suggested by Haas in his tax opinion, Government's 8, references to that order having been eliminated from a draft, Government's 2-A, of the Williams-Agencias agreement.

Haas' opinion (Government's 8) also [7187] suggested that there be a modification of a draft, Government's 2-A, of the Williams-Agencias agreement so that final action on all matters relating to the contract to be taken in Cuba although Klein might receive copies of correspondence sent to Cuba. This modification Jacobs accomplished.

Haas' opinion also suggested that after Williams executed the contract in the United States, Agencias executed the contract in Cuba.

Jacobs also testified on cross that Government's 4 and 5, regardless of the dates thereon, were both prepared by Jacobs at the same time and were both simultaneously sent by hand to R. C. Williams & Company for signature on April 20, 1944.

Paragraphs 1, 2 and 3 of Government's 5, the supplemental contract, came, in substance, from a draft, Government's 2-B, of the Williams-Agencias contract.

Paragraphs 4 and 5 of Government's 5, the supplemental contract, came, in substance, from discussions which Jacobs had with Alprin. Williams wanted paragraph 5 calling for payments for the merchandise in New York City. Jacobs may have [7188] telephoned Alprin on April 20, 1944 for permission to include paragraphs 4 and 5 in the supplemental contract, Government's Exhibit 5.

Although he did not recall having drawn it, Jacobs identified defendant Alprin's R as a letter prepared by Jacobs on April 18, 1944—two days before Government's 5 (the supplemental contract). Jacobs identified defendant Alprin's R as a draft of a supplemental agreement in accordance with the suggestions in Haas' tax opinion, Government's 8, which was dated April 17, 1944.

Jacobs testified that defendant Alprin's R, the draft of the supplemental contract dated April 18, 1944, was based on Haas' tax opinion, Government's 8, dated April 17, 1944, not only because of the sequence of dates but also because provisions contained in defendant Alprin's R, the draft of April 18, 1944, of the supplemental agreement were contained in earlier drafts of the principal agreement.

Jacobs discussed the subject matter of the April 18, 1944 draft, which Jacobs prepared, with Alprin and the changes thereto which appeared in the sup-

plemental contract dated April 20, 1944, [7189] which Jacobs also prepared, Government's 5, namely the additions of the fourth and fifth paragraphs.

Jacobs reiterated his earlier testimony that the splitting of the Williams-Agencias contract into a main document (Government's 4) and a supplemental document (Government's 5) was upon Alprin's suggestion and, in so far as paragraphs 1, 2 and 3 of the supplemental document are concerned, pursuant to Haas' tax opinion (Government's 8).

Jacobs entertained no doubt that paragraphs 1, 2, and 3 of the draft of the supplemental agreement of April 18, 1944 (defendant Alprin's R) and of the supplemental agreement itself of April 20, 1944, (Government's 5) stemmed from the Haas tax opinion of April 17, 1944 (Government's 8).

Jacobs then identified defendant Alprin's S as a letter sent by him to Alprin on April 13, 1944, dictated by Jacobs and typed by his secretary, and identified reference therein to an enclosure as being to a draft of the supplemental agreement of April 20th. 1944, and admitted that his testimony that defendant Alprin's R, the April 18, 1944 draft [7190] of the supplemental agreement, and Government's 5, the supplemental agreement of April 20th, 1944, were based on Government's 8, the Haas tax opinion of April 17, 1944, was wrong and was based upon conclusions drawn from papers presented to him. Jacobs finally stated that the supplemental agreement, Government's 5, could not have been based on the Haas tax opinion, Government's

8, and that he was mistaken in his earlier testimony to the contrary.

And that concludes the Jacobs' cross and the Jacobs' testimony, and in view of the fact that we will have some time to spend on matters presently of no interest to the jury I will excuse the jury until 10.30 tomorrow morning and ask counsel to to remain. At 10.30 tomorrow morning I will continue with my recital of the summary of the testimony. Good night.

(The jury left the courtroom and the following is in the absence of the jury.)

The Court: Now, then, Mr. Kiendl, which stipulation did I forget or omit?

Mr. Kiendl: It isn't specifically in the form of a stipulation but I think your Honor will [7191] agree that it was in the nature of a stipulation by Government's counsel.

At page 3219 of the record—and it is very short and I think I can read it to your Honor without burdening you with getting it.

The Court: It is all right, I have got it right here. 3219?

Mr. Kiendl: 3219.

The Court: I hope it is short because I'll wind up with an inferiority complex having missed one of these.

Mr. Kiendl: I don't think you missed anything. In the second paragraph Mr. Tyler states:

"Now, certainly—the reason I make that point, your Honor, is that we are not urging

that this is Klein's money, this $264,000, that Koerner made some kind of a deal with to take off on his shoulders and thereby minimize Mr. Klein's tax."

And when we came to the——

The Court: Was that in the presence of the jury?

Mr. Bauman: No, it wasn't. It was an [7192] argument.

Mr. Kiendl: I don't think it was.

The Court: I don't think it was.

Mr. Bauman: I think it was an argument in the presence of the Court alone.

Mr. Kiendl: I think that may be so.

And then if your Honor will look at page 4409 in connection with the Alprin and Roer return your Honor inquired as follows in the first paragraph on page 4409:

"The limitation to the fifth count only placed upon the receipt of both Government's 348 (the Roer 1950 return) and 347 (the Alprin 1952 return) is upon the assumption that there applies to each the same qualification stated by the Government with respect to Government's 253 (the Koerner 1952 return), i.e., '. . . we are not urging that this is Klein's money, this $264,000, that Koerner made some kind of a deal with to take off on his shoulders and thereby minimize Mr. Klein's tax.'

"May I ask now, Mr. Bauman, whether that is so with respect to the Roer 1950 return,

Government's 348, and the Alprin 1952 return, [7193] Government's 347?"

And then Mr. Bauman replied to your Honor:

"I make with respect to those exhibits the same representation and concession I made with respect to the Koerner return."

The Court: Now I take it you want me to state to the jury that there was a stipulation to that effect?

Mr. Kiendl: Yes, a representation and concession to that effect.

The Court: Now let's analyze that. First I would like to ask Mr. Bauman if he wishes to be heard.

Mr. Bauman: Yes.

It seems to me that at the time those statements were made both of them were made out of the presence of the jury. They were made at a time when we were talking about, I believe, the admissibility of certain returns,—and I am speaking from recollection now. They were made addressed to a legal question. And as a matter of fact back on 3219 I seem to have said:

"Let's say, as Mr. Tyler has already said, [7193-A] the Government does not contend that this $264,000 was the property of Klein at the time it was up in Canada in Alprin's possession . . ."

And I would say there is no clearcut concession of facts. There is not clearcut——

[7194] The Court: As a matter of fact I don't recognize this as a concession of a fact at all.

Mr. Bauman: Well, that is the position that I am trying to take, your Honor: that this is not a concession of a fact; it was a statement made in legal argument.

Mr. Bender: I think your Honor might consider this: that if your Honor was under the impression that the concession that Mr. Bauman or Mr. Tyler, whoever made that statement, was limited as Mr. Bauman now says, firstly the defendants might have taken a totally different position or another position on the motion for judgment of acquittal on the fifth count and your Honor might have considered the argument with regard to the fifth count from a totally different point of view, because as I gather now Mr. Bauman wants to be free to take the position that all of this money belongs to Mr. Klein.

Mr. Kierdl: To Mr. Klein?

The Court: And you will recall, gentlemen, in my discussion of the fifth count I indicated the Court's notion that this might be neither a liquidating dividend nor a gift or bonus; it might be something else.

[7195] I am not disposed—if you wish to place anything else on the record, I am not disposed to advise the jury of that as a stipulation of fact. If anything it is a concession of a theory, and I think it is one of the facts that the jury may ultimately have to decide. And I certainly don't agree, Mr. Bender, that you are caught by surprise because as early as

my denial of the motion for judgment of acquittal on the fifth count I very clearly indicated, at least in my mind, that I thought that a reasonable person might conclude that this money was neither a liquidating dividend nor a bonus or gift or compensation or commission or expenditure—I think I have covered practically every category that was used in this trial—for a job well done in Harwood's. And of course I have in mind, particularly the closing paragraphs of Mr. Haas' statement to the Internal Revenue people when he quoted Klein as having said that Klein was very glad that the money was still in status quo, so to speak, because he had not disclosed the resting place to the government agencies and that his settlement was almost at fruition on his tax matter and he would have to pay a capital gains tax not having made that disclosure, and that he felt it was a good thing [7196] that the money was being held because he could get it back.

Now in view of all of that you may place or you will be deemed to have placed the request on the record—you have specifically done so; at least Mr. Kiendl has and I take it the other two defendants' counsel join in that application——

Mr. Donohue: Yes, your Honor.

Mr. Bender: Yes, your Honor.

The Court: —that I advise the jury of that concession, and I decline to do so because I do not put that in the category of a stipulation of fact as I understand the fact to be.

Mr. Bender: Might I point out to your Honor that the interpretation that you have just put on this particular part of Haas' statement is beyond what I think the statement says. There is nothing, as I recall Mr. Haas saying, which would indicate that all of this money, which was going to Alprin, Koerner and Roer, was being held for Mr. Klein, which is what we are talking about.

The Court: No, I say that the trier of the fact on the basis of the language employed is the one to decide whether that is so or not.

[7197] Mr. Bender: Yes, but faced with that statement which the Government had and which the Government took at the time when they tried this case, on the first four counts at least, they came out flatly and said that that money does not belong to Mr. Klein but belongs to Mr. Koerner, Mr. Alprin and Mr. Roer, and now your Honor having made your position they are now reverting to a position where they can argue to the jury that it is Mr. Klein's money.

The Court: Precisely.

Mr. Bender: I say they can't do that.

The Court: I say they can, and in this court what I say counts. You have your objection and that is that. But I say they can and I say that it does not or should not take you by surprise, because as early as my denial of the motion for judgment of acquittal on the fifth count I made it clear that at least in my view appraising the facts—and I am not the trier of the facts; the jury is, but I do not intend

to foreclose the jury on a determination which I think it can make on the record.

Mr. Bender: May I continue to just say this:——

The Court: Mr. Bender, you put everything on the record and everything that you think can persuade [7198] me you tell me.

Mr. Bender: Yes, I am not now talking for the record; I am just trying to persuade your Honor.

The Court: I understand that.

Mr. Bender: As I gathered your Honor's hypothesis it was not a question of whether or not the jury could determine at this point that this money belonged to Klein, but rather a hypothesis based upon some theory of a holding. In other words, assuming the jury does not understand what was the reason why this money was held, that it might not be a liquidating dividend, that it might be this or it might not be that, yet they might find that a conspiracy existed to hold.

The Court: Yes.

Mr. Bender: That is how I understood your hypothesis.

The Court: Yes, to hold Klein's money so that the Government couldn't find out where it was.

That is what I take to constitute the fifth count. And I say that that is an issue that the jury may well determine under the facts in this case, and I decline to advise them that there was a stipulation otherwise because it is not a stipulation of fact.

[7199] Mr. Bender: Well, would it be fair to say that this is the first time that your Honor has so explained your third hypothesis?

The Court: No, because I think I indicated it very clearly when I refused to grant your motion. It may be fair from your view but I won't consider it fair to say that this is the first time I indicated it, because in my denial of the motion for judgment of acquittal on the fifth count I think I made it clear—now again I might not have made it as clear as I wanted it to be, but I thought it was clear.

Mr. Kiendl: If your Honor please, do we understand that in the face of a representation and concession by the United States Government in this case that this is not Klein's money your Honor is going to permit Government's counsel to argue the direct contrary to this jury?

The Court: Yes.

Mr. Kiendl: That we must except, your Honor.

The Court: What do you say?

Mr. Kiendl: That we must except if your Honor does.

The Court: Yes, and I don't think it will do any violence to the defendants. They can put in all [7200] their proof. They were advised or should have been, as I read my language, should have suspected at least, that I would so rule.

And incidentally you are asking that I instruct this jury that a concession was made of an ultimate conclusion, not of a fact.

Mr. Kiendl: It seems to us it is clearly a concession of fact that this is not Mr. Klein's money. I don't see what else it can be but a concession of fact.

Mr. Donohue: May I ask your Honor to permit me to ask the United States Attorney if he has now reached a different conclusion that this is or was Mr. Klein's money?

The Court: Yes. As a matter of fact, if he doesn't care to answer you I will ask it.

Mr. Bauman: I was going to tell Mr. Donohue that I don't care to answer his question.

The Court: All right, then don't answer Mr. Donohue, but let me ask you do you intend, whether this be a fact or a theory, to urge at any time in this trial that this money was Klein's money at any time after he parted with the possession of the checks made out to Fernandina and Economica?

[7201] Mr. Bauman: Your Honor, I hope that the course of this trial has indicated that I have answered your Honor's questions whenever that was possible. I say to you now, sir, that I cannot answer your Honor and I say it to you in all conscience that this case has some way to go and I don't know what is about to eventuate.

The Court: Well, Mr. Donohue, he won't answer you and he can't answer me. That is the best I can do.

When do you think you might be in a position to answer both of us?

Mr. Bauman: I don't know, your Honor, but I do say at the present time I just can't. I can't say.

The Court: I would suggest to the defendants knowing the Court's frame of mind and knowing of the unnourishing—if there is such a word—infor-

mation that they have gotten from the United States Attorney that they cast their summations on the basis that he is going to urge that it was Klein's money.

Mr. Donohue: I would like to say that this is the first time in nearly thirty years that I have been called upon to defend a case after hearing the United States Attorney following 18 weeks of trial say that he wasn't certain what the theory of his case was. But [7202] I am called upon to defend it.

Mr. Kiendl: How can we defend it?

The Court: That may have been your experience and it may be out of an abundance of caution. However I am disposed to ask defendants' counsel now—no, I withdraw that. I will make no inquiry at the present time. But I think I have made the Court's position amply clear and I think you understand the Government's position that it will not adhere to this concession at the present time if such it be.

[7203] Mr. Kiendl: You say that the Government does not adhere to its concession?

The Court: At the present time it will not state categorically it made that concession.

Mr. Kiendl: I submit, if your Honor please, that your Honor should compel the Government to either say it is going to stand by its representation and concession in this court as it is made squarely before the defendants are put in a position where they have to put in any defense whatever. It seems to me entirely unfair.

The Court: I decline to do so because I don't think that a United States Attorney has the right to concede away criminal liability if the record shows it. This is not the stipulation of the fact. And if the jury find on the facts adduced that this was Klein's money and that it secreted or things were done so that the Government could not find out where it was in the exercise of its collection function I think that Klein or anybody connected with Klein in that device should pay for it and I don't think the United States Attorney, if the jury finds those facts to be so, has the right to get up and make a statement that [7204] would rob the Government of that redress if the jury finds that it existed, and for that reason I say that I do not consider that a stipulation of fact as I consider other things to be stipulations.

I'll tell you very frankly my mind is pretty well crystalized on it, gentlemen. You are at liberty to say whatever else you wish to me on the record if you feel that anything has remained unsaid. I think I have made my position very clear on it. Now what the Government proposes to do ultimately remains for the Government to decide.

Mr. Bender: It is clear to me, your Honor, for example, if the Government takes a position with regard to an item in the bill of particulars which your Honor, we will say, in the course of a motion before trial compels them to do, now if they take that position they can't recede from it on the trial. The defendants are afforded an opportunity to know

what crime they are charged with and in doing so they are not giving away something.

The Court: Mr. Bender, you are merely now rearguing what you argued on your motion for a [7205] directed verdict of acquittal on the fifth count. You pointed to the Government's bill of particulars on the fifth count and indicated that there were factors that the Court considered in denying that acquittal that were outside of what the Government limited itself to in the fifth count and I rejected your argument. It is the same rationale. It may be that I am completely wrong about it. I may be tipping the scales in this determination in the Government's favor. I don't know. But if that's the way I see it——

Mr. Bender: No, I am taking issue merely with the statement your Honor just made that you couldn't compel the Government to take a position with regard to this fifth count which you felt the record precluded you from doing. But I say to you the Government has taken a position just as it did in the bill of particulars that all of these checks belonged to each of the individual defendants that received them, then there would be no question even if the evidence, as you say, showed something to the contrary.

The Court: And I say, Mr. Bender that that's no different from the argument you advanced [7206] when you moved for a judgment of acquittal on the fifth count by virtue of limitation in the

Government's bill of particulars and I rejected the argument.

Now, there has to come a time when one or another of us disagree on these things and this is the time—at least one of the times.

Mr. Kiendl: In any event, as I understand it your Honor is not precluding us from arguing to this jury, if the case goes to the jury, that the Government has done a complete right about face in this case?

The Court: I will permit you to do that, yes. I will permit you to quote the concession.

Mr. Kiendl: That is exactly what we would like to do.

The Court: On one condition—I can't impose that condition, I am very sorry, because the Government sums up last. I was going to say—well, Mr. Bauman, in view of the fact that you have the right to sum up last and I certainly wouldn't impose on the defendants the obligation of stirring this situation up in the event that you intend to remain silent, I will therefore require you to give [7207] me an answer by adjournment time tomorrow, 4:30, as to whether you intend to urge in your summation that this money belonged to Klein at any time either titlewise, or beneficially, equitably, legally—I am going to ask you to state your position whether this money didn't belong to Klein at any time after he parted with the three checks, the two to La Economica and the one to Fernandina.

Mr. Bauman: I will be happy to——

The Court: Because if you do intend to urge that in the face of this concession which I am ignoring momentarily then the defendants have the right to know it.

(Mr. Bauman nods.)

The Court: And if you do agree that you will take that position—now this may sound very strange—but I am going to insist that you take that position in summation because the defendants then undoubtedly will have opened the jury's mind to thinking about that in anticipation of what you have previously committed yourself to as the Government's position.

Now do I make myself clear?

Mr. Bauman: You do.

[7208] The Court: On the other hand if you make a commitment that you are not going to urge at any time in this trial that this was Klein's money, as you apparently did by these concessions but within certain limitations, then the defendants are free not to touch it, not to waken a sleeping dog when they sum up. Whatever commitment you make that is the way it will have to be. So that you are being pinned down to make a choice and I give you until 4:30 tomorrow to make that choice.

Mr. Bauman: May I ask one question along those lines?

The Court: Surely.

Mr. Bauman: And that is that—I will withdraw that for the time being.

The Court: Why don't you think about it. If you have any questions, if anybody has any questions we can have them brought up in the morning.

Mr. Kiendl: Could we have some idea about how long your Honor's summary of the evidence will take tomorrow? Will it take all morning?

The Court: Oh, yes, I think it will, gentlemen. I have read this much of it (indicating) and I have this much to read (indicating). From that [7209] you can judge it will take at least all morning.

Mr. Kiendl: Now may we hand your Honor our objections to some of the Government's requests to charge?

The Court: Yes. Thank you (handed).

Mr. Kiendl: We have them separately, the original requests, the supplemental requests and the second supplemental requests.

The Court: All right.

If there is nothing further, gentlemen——

Mr. Bender: There is one other thing.

The Court: Yes, Mr. Bender.

Mr. Bender: I think this is likewise in the category of a concession made by the Government although I don't think it is a part of the transcript. I think it was contained in the briefs submitted by the Government in opposition to certain motions.

The Court: Motions before me?

Mr. Bender: Yes.

Colloquy

The Court: All right, let's limit it to those before me.

(Discussion off the record.)

Mr. Bender: The checks are in evidence in this case payable to Marin, Koerner and Roer.

[7210] The Court: Yes.

Mr. Bender: As well as the one paid to Haas and Roer and the Government conceded in their brief that none of those checks or payments came out of the million and a half alluded to in the Bennett testimony and the Rokoff testimony. Now the reason why that becomes important, your Honor, is this: That the testimony with regard to this entry of the million and a half is cloaked in a mysterious cloud as far as this jury is concerned and that is the way it is going to be unless——

(Discussion off the record.)

The Court: Well, I may indicate to you that notwithstanding recent pronouncements of the Court of Appeals I don't propose to discuss the facts at any great length, particularly in this case when I am now reviewing what I consider all of the testimony in the Government's case up to this point. So if you are relying on me to engage in any discussion of the facts that will clear up anything in the charge please don't do so because I intend to touch upon the facts only in the most general terms. It would be a simple matter for me to take the product of this work and put it in a charge, but I don't propose to do that.

[7211] Mr. Bender: Then it becomes all the more important since this charge has something to to with throwing sand in the eyes of the Government or concealing because one entry had this million and a half as a long-term receivable and another as a commission paid, that that entry had anything to to with the checks that were made payable to Koerner——

The Court: I don't think that that calls for any instruction. That is for summation. I might as well take and substitute my judgment of all the evidence in the record for theirs. I won't do that.

Mr. Bender: The Government conceded that in the briefs.

The Court: Maybe Mr. Bauman might have said something at lunch to somebody. How far are we going to go? No, I won't take that.

Ten-thirty tomorrow.

Mr. Kiendl: There is one thing that was overlooked. Your Honor stated in the course of your statement to the jury that counts 1, 2, 3 and 4 from now on are entirely and completely out of this case and you will never refer to them. I have a lot of arguments based on 1, 2, 3 and 4 that I want to use in my summation. I assume you were not precluding me from referring to [7212] them in my summation?

The Court: All I meant was that they are not going to decide guilt or innocence as to those counts.

It seems to me that you can't get background in this case unless you go through 1, 2, 3 and 4.

Mr. Kiendl: We are looking for that background in our summation.

The Court: All right.

(Adjourned to Tuesday, July 26, 1955, at 10.30 o'clock a.m.)

[7213] New York, July 26, 1955; 10.30 o'clock a.m.

Trial resumed.

(Jury present.)

The Court: My attention has been called to the fact that I neglected to include, and I now do so, in the list of those witnesses whose entire testimony remains in evidence, no part of which was stricken, the testimony of Lawrence G. Baker, the manager of the Hudson Street office of The First National City Bank, conversations in 1951 with Koerner and in 1952 with Roer. And I advise you that although these conversations took place subsequent to the catalog date of June 1, 1946, I have admitted these conversations as against all three defendants.

And now to continue with the summary of the testimony of witnesses as to that portion of their testimony not stricken.

The next would be Evelyn Lowy. Not stricken from her direct testimony was her statement that she is [7214] presently a housewife, was employed as secretary to H. H. Klein in June, 1945; from 1945

to March, 1948 she was thus employed at the office in the O'Sullivan Building in Baltimore, Maryland, that she prepared invoices similar to Government's 13-A to K from information taken from Duncan Harwood & Company, invoices given her by Mr. Rokoff.

That is all of the Lowy testimony that remains in evidence.

The next is that of the witness George M. Ackerman. Mr. Ackerman's direct testimony not stricken was where he testified that Koerner showed him long yellow pages with the names of states and distributors and the number of cases each distributor was allowed to purchase, and stated that the allocations thereon were final and could not be changed because they came from H. H. Klein in Baltimore.

That portion of Ackerman's cross-examination not stricken is when he testified that he knew that allocations were being made generally in the whiskey industry in 1945; he made them himself; there was nothing unusual in this practice because of the short supply of whiskey.

That is all of the testimony of the witness [7215] Ackerman that remains in evidence.

The next testimony not stricken is that of the witness Salvatore—Nicholas Salvatore. In his direct there was not stricken his testimony that from 1927 to 1939 Salvatore worked for Jaburg Bros., Inc. as an office boy and in the billing department. He came with them to R. C. Williams, Inc. in 1939 as a billing clerk in the grocery department. He was transferred to the wholesale liquor division in

late 1943 or early 1944 where his immediate superior was Irving Koerner. The commissions reported by Salvatore in Defendant Koerner's AF and AG were taken from memoranda given him by his superior, Koerner.

Payments of commissions were made as follows: Salvatore would compile the information by the 10th of the month following shipment and prepare vouchers. Koerner and Rudin, the assistant to the president, would approve the vouchers. Checks would be drawn. Salvatore would prepare explanatory letters of transmittal which Koerner would sign to accompany the checks. The memoranda which Salvatore received from Koerner set forth the territories assigned to the persons receiving commissions and would be changed from time to time by supplemental memoranda from Koerner. [7216] The form of the commission books, Defendant Koerner's AF and AG, was cleared by Salvatore with Koerner and Rudin. The entries in defendant Koerner's AF on pages 202, 203, 204, 205 and 206 and 207 reciting payments to Morris Alprin of retainer fee at the rate of 60 cents per case on certain cases of whiskey were made by Salvatore upon instructions by Koerner to set them up in that manner.

That is all of the testimony of Salvatore that remains in the case.

[7217] We then come to the testimony of Abraham Rudin. Of his direct testimony, the following remains in:

Abraham Rudin has been secretary of R. C. Williams Co., Inc. since May 1, 1952, and treasurer since May 1, 1948. Prior thereto and from May 1, 1941, when he came to work for the company, he was special assistant to the president.

He had been a certified public accountant in New York State since 1933 or 1934. Rudin, who knows Jules Jacobs' handwriting, having seen it over the past 15 years, identified the matter written in pencil on the bottom of Government's 11 as that of Jacobs. That is all of the testimony of Rudin that remains in the case.

We then come to the testimony of Thomas W. Hill, Jr. In his direct testimony, he testified that he is an attorney who in May 1954 was admitted to the bar, and for nine months was an Assistant United States Attorney.

On May 7th 1954, he received Government's 254, consisting of two photostats of office file copies of letters dated April 17th and 19th, 1944, from Alprin to H. H. Klein, and the cover letter of [7218] Alprin to Hill, dated May 6, 1954, sending Hill the photostats and the envelope in which the cover letter and photostats were mailed to Hill by Alprin.

The documents from which the photostats in Government's 254 were made were remembered by Hill to be those shown to Hill by Alprin at a conference on May 6, 1954. They were voluntarily sent to Hill by Alprin.

I point out to you that all of Hill's testimony which remains in and which I have just summarized is in evidence only as to the defendant Alprin. It was stricken entirely as to the defendants Klein and Haas.

The next testimony to remain in was that of the witness Edward C. Holahan. His direct testimony still in evidence is the following:

Prior to his retirement on December 31, 1954, Holahan was first agent—that is, top executive—for the Royal Bank of Canada in New York. He had been in charge of the New York branch for three years. He was second agent from 1938 to 1949. He was with the bank for 41 years.

He knew H. H. Klein and saw him during 1944. [7219] In September 1944 Klein came to the bank and opened an account for Agencias Destiladores, S. A. The opening check for slightly less than a half million dollars was said by Klein to represent the proceeds of a liquor sale by Agencias, which shipment Klein also said had originated from the United Distillers of Canada in Vancouver. Klein also explained the Cuban corporation as having been set up to gain some tax benefit.

In early September 1946 Baker spoke to Klein by telephone. In the September 1946 telephone conversation between Holahan and Klein——

Mr. Kiendl: I think you said Baker instead of Holahan, your Honor.

The Court: I am sorry. I should have said Holahan. I have Baker on my mind, either not at all or too much. I will correct that.

I will read that again. In early September 1946 Holahan spoke to Klein by telephone. In the September 1946 telephone conversation between Holahan and Klein, Klein said he wanted certain Dominion of Canada bonds then held for safekeeping by the bank in New York transferred for safekeeping to the bank in Montreal.

[7220] Holahan asked Klein for written authorization for the transfer and promised to attend to it immediately. Bonds were thereafter transferred for safekeeping from New York to Canada as follows, and all of these transfers were dated September 16, 1946, and they were made for the following accounts of the following companies in the following amounts:

Regan Potter, $1,622,000;

Regan Potter, $1,025,000;

Seaboard Syndicate, $500,000;

Seaboard Syndicate, $2,875,000;

Waldorf & Company, $125,000;

Waldorf & Company, $2,200,000, or a total of $8,347,000.

Now of his cross-examination the following of Holahan's testimony remains in evidence:

Holahan met Klein after repeal of the 18th Amendment and saw him occasionally from then to September 1944. Aside from instructions where the

accounts, statements and canceled checks, et cetera, were to go. Holahan testified as to only two conversations with Klein. One in September 1944 at the bank, and the other in September 1946 [7221] over the telephone.

At the September 1944 conference Klein came with a check for almost a half million dollars payable to Agencias Destiladores to open an account in the name of the company. From a duly certified copy of a corporate resolution then or shortly later supplied, Holahan learned that Agencias was a Cuban corporation. The Agencias account was substantial and active for at least two years.

Holahan at the September 1944 conference was told that the check Klein was depositing was from the Chase National Bank to Agencias under a letter of credit, opened to finance shipments of liquor by Agencias, by United Distillers in Canada.

Holahan understood that later deposits to the Agencias accounts were for similar transactions.

At the September 1944 conference Klein said to Holahan, in answer to Holahan's inquiry why a Cuban corporation was used, that there were some tax benefits to be derived because the sales were being made outside the United States.

After the Agencias account was opened, a number of other Cuban corporations opened accounts [7222] at the bank through Mr. Klein. These accounts were opened by Holahan or others in the bank in a manner similar to the opening of the Agencias account by Klein or his representative.

Holahan knew that Klein was an officer of United Distillers of America, Limited.

On one occasion, when the other Cuban corporation accounts were being opened, Holahan asked Klein who the stockholders were of these corporations and Klein said that he and others associated with him or with United Distillers of Canada were.

When Klein in a telephone conversation of September 1946 asked Holahan to transfer the bonds for safekeeping to Canada, Holahan consulted the bank's lawyers, Root, Clark, et cetera, and received their approval before agreeing to do so. Thereafter the $8,347,000 in bonds were transferred to Montreal to be held in safekeeping there. That is all of the Holahan testimony that remains in evidence.

Now we come to the testimony of Henry G. Burke. Of his direct not stricken, Burke testified that he is a lawyer and an accountant in Baltimore, Maryland with the firm of Burke, Landsberg & Gerber. [7223] He first met Klein in 1933 or 1934. His firm did accounting for Klein and corporations in which Klein was interested. It prepared Klein's personal income tax returns. It rendered an opinion, Government's 359, at Klein's request in the spring of 1945.

Burke had a copy of Government's 4, the Agencias-Williams main contract, which he had obtained from Klein, but he did not have a copy of Government's 5, the Agencias-Williams supple-

mental contract, before him when he rendered the opinion, Government's 359.

Burke over the years has seen Klein's signature many times.

As to the Burke cross-examination, there remains in evidence his testimony that when Burke was asked to formulate an opinion, he expected to be paid and did receive $250 for it. His opinion was honest and not based upon any particular type of opinion that Klein might have desired. Klein never expressed any indication that he desired a specific conclusion in the opinion.

Burke researched the cases and regulations in formulating the opinion. Although the opinion was rendered in March 1945, shortly before income tax [7224] day, Klein did not ask Burke to prepare the opinion with a view to Klein's affairs in connection with the corporations with which Klein was connected.

There was some redirect of Burke that was not stricken; namely, that Burke prepared the opinion on the basis of information given him by Klein.

That summarizes the total of the Burke testimony still in evidence.

We now come to the testimony of William Rokoff. That is the last of the oral testimony before we take up the consideration of the statements of the various parties.

Rokoff's testimony, in portion, was preserved both on direct, on cross, on redirect and recross. The

direct testimony of Rokoff that still remains before you is the following:

Rokoff is and since June 1945 has been office manager of H. Harvey Company. Prior thereto he was secretary and assistant to H. H. Klein, president of United Distillers of America, Limited. He commenced working for Klein in September 1943.

Rokoff kept books for Klein and from the commencement of the Harwood deal kept books of account of the corporations involved therein.

[7225] Rokoff rewrote pages of books on occasion. He rewrote books connected with the Harwood whiskey situation. He possibly rewrote pages of books in evidence. He rewrote pages that weren't neat or books that weren't neat or books where numbered pages were torn out, although he never deliberately tore out a numbered page

In March 1947, Rokoff, Ellis Rosenberg and Hyman Klein went to Canada. Rokoff at Klein's direction took several sets of books of the Cuban and Panamanian corporations in the Harwood deal with him. Rokoff stayed at the Queens Hotel. Rokoff worked on books under Klein's direction in Canada. Rokoff worked on books in the hotel room in Canada.

[7226] The Cuban books were sent to Canada. Klein having sold out his interest, Rokoff took his memorandum records to Canada and brought them and the Cuban books into agreement where necessary.

Rokoff may have made entries in all of the memorandum records which he brought to Canada. Rosenberg was with Rokoff some of the time while Rokoff worked on the books. Klein was never there. Rokoff spent two or three days in Montreal. He brought the books up there at the request of his boss, H. H. Klein.

The memorandum records of Regan Potter & Co., Ltd., Government's 379, are all in Rokoff's handwriting except an entry at the bottom of page 24. Rokoff kept memorandum records of Tivoli. Government's 380 is a book purchased in Montreal at Burton's, Ltd., a stationery store, by either Rokoff or Rosenberg in March, 1947. While Rokoff may have written Government's 380 entirely in Montreal in March, 1947, he could not remember having done so. It could have been copied from a book having one or more bad pages, et cetera.

Government's 380 was written during or after March, 1947, and was copied from another record which could have been bound or loose-leaf. Rokoff didn't remember, but denied that it could not have existed [7227] at all.

Rokoff could not recall the circumstances under which the words "and expenses" were written upon pages 13 and 14 of Government's 380, the Tivoli memorandum record. All Rokoff's entries in Government's 380 were made upon instructions received by him from Klein or Rosenberg.

Rokoff got the data for the balance sheets, Government's 381, from the memorandum records he

kept. He prepared the balance sheets shortly after December 31, 1946. On page 22, the journal page of the Regan Potter & Co. memorandum records, Government's 379, are entries dated October 25, 1946, November 1, 1946, November 6, 1946 and December 26, 1946, followed by entries dated December 16, 1946. On that page and on pages 128 and 129 of Government's 379 are entries reflecting a loan of $1,500,000 written by Rokoff. These entries would indicate a Regan Potter asset of $1,500,000 as of December 31, 1946.

On the Regan Potter sheets in Government's 381, the balance sheets, no assets of a loan receivable for $1,500,000 appears. Had the Regan Potter balance sheet in Government's 381, prepared after December 31, 1946, been taken from the Regan Potter bound memorandum [7228] records, Government's 379, the loan receivable would be reflected in Government's 381. Rokoff did not remember rewriting the Regan Potter memorandum records, Government's 379, after he prepared Government's 381.

Also on pages 22 and 186 and 187 of the Regan Potter memorandum record Government's 379, appear entries reflecting $664,096.62 for commissions paid, whereas the Regan Potter, sheets in Government's 381, the balance sheets as of December 31, 1946, showed the commission paid at $2,164,096.62. Thus the commissions paid on the balance sheets could not be taken from the commissions paid in the memorandum records. Rokoff could not say where these figures came from. He could not re-

member having rewritten the Regan Potter memorandum records or what he rewrote.

Rokoff could have rewritten the Tivoli memorandum records, Government's 380, in the book bought in 1947, with entries going back to 1945, but did not know if he rewrote the Regan Potter memorandum records, Government's 379. The difference between the commissions-paid entry in Government's 379 and that in Government's 381 was exactly $1,500,000.

Rokoff wrote the September 18, 1946, check on the Cameron Stuart account in the Royal Bank of [7229] Canada drawn to Compania Continentale S. A. for $3,000,000, and it was signed by H. H. Klein. Rokoff may have typed the November 4, 1946, check on the Compania Continentale account in the Royal Bank of Canada drawn to Cameron Stuart for $3,000,000 and also signed by H. H. Klein.

The only entry in either Government's 377, the memorandum records of Continentale, or Government's 378, the memorandum records of Cameron Stuart, is an entry in the cash disbursements page of the Cameron Stuart record, but this is crossed out and marked "Error" and is not posted to the ledger page. Rokoff could not remember if Klein directed him to cross out the entry and mark it "Error." He would not do so on his own and must have been told to do it, but did not remember. The only persons who gave Rokoff instructions as to entries in the records were Klein and Rosenberg,

and Rosenberg only to the extent of telling Rokoff the amount of Cuban expenses. Rokoff made the December 10, 1945 entries in Government's 379, the Regan Potter memorandum records of commissions payable and loans receivable, at Klein's direction, the entries in the Tivoli memorandum records, Government's 380, of $1,500,000 loan from Regan Potter, with the corresponding entries [7230] in the Tivoli records of that loan appearing in the Regan Potter records.

Rokoff subscribed to stock in Tivoli Trading Corporation in the latter part of 1945. He gave Klein a $150 check made out to Tivoli for 150 shares.

The subscribers he recalled were Rokoff, Silver, Rosenberg, Koerner, Roer and Alprin. He did not know H. S. Lechtzier as a subscriber and could not recall it.

He received no stock certificate.

Rokoff's stock subscription was later cancelled Klein returned Rokoff's money in cash and Rokoff signed a receipt (Government's 389) for it which Rokoff type at Rosenberg's request.

Rokoff typed other receipts (Government's 388) when he typed his. No one instructed him to leave the dates off.

No entry of the repayment of the stock subscriptions was made in the Tivoli records (Government's 380).

The receipts were typed on half sheets of paper by Rokoff cut either before or after the typing

but otherwise he did not remember anything being typed on the upper half of the sheet, upon the lower half of [7231] which a receipt was typed.

Rokoff did not see the other receipts signed.

Now that is the direct testimony of the witness Rokoff that is still before you and has not been stricken. We now turn to the testimony still before you on Rokoff's cross-examination:

Rokoff, a married man with a family, living in Baltimore, is named as a co-conspirator but not as a defendant in the indictment.

He was originally employed as secretary to Klein with the title of assistant to the president in 1943 when Klein was president of United Distillers of America, Ltd. In July, 1945, he became office manager for H. Harvey & Co. when it began doing business and has been such to date.

H. Harvey & Co. was distributing agent for Auld Malcolm Whiskey and Dunbar Whiskey in the United States. Its business came to an abrupt end when a jeopardy assessment was levied against it in March, 1948 by the Government.

At present Rokoff is the only employee in the office and has been for some months.

Rokoff saw the original jeopardy assessment against H. Harvey & Co. in the office about March 3, [7232] 1948. He also saw those issued against H. H. Klein and Mrs. Klein.

He did not recall having seen the 90-day letter to H. Harvey & Co., Ltd., dated March 10, 1948, but knew that on that date the company's bank

accounts had been levied on by the Government and checks that he had issued were dishonored. The accounts have been blocked since and the levies never withdrawn or cancelled.

Rokoff, who is neither an accountant nor a certified public accountant, got his bookkeeping education in high school and by practical experience.

When Rokoff went to Canada in March, 1947, with Rosenberg and Klein and Rokoff stayed at the Queens Hotel, Klein stayed at the Mount Royal Hotel and Rokoff was not sure that Rosenberg stayed at the Queens Hotel. Rokoff did not see I. J. Klein nor Norgan there but he did see McLennan.

The Mount Royal Hotel was crowded to capacity and Rokoff could not get accommodations there. After trying other hotels he and Rosenberg got rooms at the Queens Hotel, the last one they tried. Klein stayed in his brother's suite at the Mount Royal Hotel.

Rokoff went to Canada at Klein's request in the latter part of March, 194.. that should be 1947, [7233] is that correct?

Mr. Bauman: That is correct.

Mr. Kiendl: 1947.

The Court: Before he went up, he knew that Klein had sold out his interests in most of the foreign companies, but not in Tivoli Trading Company.

Rokoff worked for Klein when the latter was president of the United Distillers Company of America, and H. Harvey & Company, and president and treasurer of a number of Panamanian and Cuban corporations.

Rokoff took his instructions from Klein, his boss and only superior, as to making entries, et cetera, and also from Rosenberg, a lawyer employed by Klein as president of these companies.

Rokoff could not recall the specific interests sold by Klein except that he sold out and retained Tivoli, but the entries in the books would show some of them.

In Government's *377* (the memorandum records of Compania Continentale S. A.) is an entry on January 20, 1947 reflecting the purchase by Continentale from Klein of 15,000 shares of common stock of Waldorf & Company, Ltd., S. A. for $960,663.26. Rokoff drew the check on Continentale's account for $960,663.26 dated January [7234] 20, 1947, in payment for that stock.

In Government's 379 (the memorandum records of Regan Potter & Co., Ltd., S. A.) is an entry on January 20, 1947 reflecting the purchase by Regan Potter from Klein of 15,000 shares of common stock of Seaboard Syndicate, S. A. for $2,771,590.69. Rokoff drew the check on Regan Potter's account for $2,771,590.69 dated January 20, 1947, in payment for that stock.

In Government's *378* (the memorandum records of Cameron Stuart and Company Limited S. A.) is an entry on January 20, 1947, reflecting the purchase by Cameron Stuart from Klein of four shares of common stock of Regan Potter & Company, Ltd., S. A. for $978,132.90. Rokoff drew the check on Cameron Stuart's account for the $978,-

132.90 dated January 20, 1947 in payment for that stock.

Rokoff knew that in addition to the sale by Klein of Waldorf, Seaboard and Regan Potter stock, Klein purchased United Distillers of Canada stock.

In the Seaboard Syndicate S. A. memorandum records Rokoff made an entry on January 22, 1947, reflecting a sale by Seaboard of 78,555 shares of U. D. L. stock at $8 per share totalling $628,440. Rokoff drew the check (Defendant Klein's Exhibit DW) [7235] for that purchase by H. H. Klein.

When Rokoff took the memorandum records to Canada, he took only those of the Panamanian and Cuban companies, actively doing business when Klein sold out, hence he did not have any for Agencias Destiladores, which had been succeeded by Ramsey Scott, or for Douglas Ryan, which had been succeeded by Cameron Stuart, or for Angus Kirby Cuba, or for Angus Kirby Panama, or for John Dunbar Cuba, or for John Dunbar Panama, all of which were not engaged in the purchase and sale of these whiskies in 1946.

When Klein told Rokoff to bring the current memorandum records to Canada he explained that he, Klein, was selling out and the records were to be turned over to the Canadians after they were harmonized if necessary with the Cuban books, which would be in Canada.

When Rokoff got to Canada he fulfilled Klein's instructions working on the Cuban books, which he

vaguely remembered were there, and his memorandum records. His records were then turned over to McLennan, one of the Canadians named in this indictment as a defendant with the two other Canadians, I. J. Klein, now dead, and Norgan.

Rokoff's records were turned over to Canadian [7230] officials as early as May 17, 1948 and copies were given the United States Treasury Department as early as May 19, 1948.

Rokoff kept the books of H. Harvey & Co., Ltd., a usual set of double-entry books. They were original books of account and thereby differed from the memorandum records kept by him for the foreign companies. Harvey kept only one set of books in Baltimore. The foreign companies kept a set of books in Cuba, and the memorandum records in Baltimore.

The instructions which Rokoff received from Klein re entries in his memorandum records were general instructions. Most entries came from documents in Rokoff's possession.

Excluding Tivoli, Rokoff could not remember rewriting a single page of a memorandum record. Klein never suggested that Rokoff falsify an entry and Rokoff never did.

The balance sheets as of December 31, 1946 (Government's 381) were for the eight companies whose memorandum records Rokoff brought to Canada.

In the Regan Potter memorandum record (Government's 379) the $1,500,000 loan receivable

entries on page 22, dated December 16, were made after [7237] those of December 26, 1946. This item does not appear on the Regan Potter sheets in Government's 381, the balance sheets exhibit. The Regan Potter memorandum record (Government's 379) on page 22 has a commissions payable entry of $664,096.62. $1,500,000 and $664,096.62 total $2,164,096.62. The Regan Potter trial balance in the balance sheets exhibit (Government's 381) contains a debit item of that exact amount, $2,164,096.62 for commissions paid."

[7238] When Rokoff prepared the balance sheets, Government's 381, shortly after December 31, 1946, he stated the $2,164,096.62 to be commissions paid but later learned the 1½ millions dollars was a loan receivable and thus made the corrections after he prepared the balance sheets on page 22 of the Regan Potter memorandum record (Government's 379) dating them December 16, 1946 and entering them after the December 26, 1946 entries on that page.

Rokoff never saw his memorandum records during the eight years from when he left them in Canada until he saw them in court at this trial.

As to the 3 million dollar check from Cameron Stuart to Continentale on September 18, 1946 (Government's 287) and the 3 million dollar check back from Continentale to Cameron Stuart on November 4, 1946 (Government's 320) Rokoff entered in the Cameron Stuart memorandum records (Government's 378) on the date of September 20th, 1946 the payment to Continentale but struck it out on

Klein's instructions and made no entry in the Continentale memorandum records (Government's 377). Had he entered the transactions in both records the balancing result would have been the same.

[7239] Rokoff entered the approximately 3½ million dollar royalties item paid Waldorf by Cameron Stuart, and the million and a half sales expense to Regan Potter and the hundred thousand dollar sales expense to Tivoli solely upon Mr. Klein's instructions and without personal knowledge of the basis of these entries.

Rokoff subscribed to Tivoli stock in late 1945. On October 9, 1945 he paid Tivoli Trading Company $150 by check (Defendant Klein's DX) which was charged to his bank account on November 21st, 1945, for 150 shares of stock. Rokoff never received a stock certificate. Rokoff received the $150 back about February 5, 1946. When he received the money back, Rokoff signed a receipt for it, Government's 389 and Defendant Klein's DY.

Rokoff never received anything from Tivoli but later he received $22,500 from Hannes & Company by check dated February 10, 1949, Government's 325, on which Rokoff paid individual State and Federal income taxes for the year 1949.

Rokoff did not conspire with anyone to evade income taxes of the Kleins, McLennan & Norgan for 1944, 1945, 1946 or for any years.

[7240] Rokoff had no say in the formation of the Cuban and Panamanian corporations.

Rokoff did not conspire to defraud the Government by impeding, impairing, obstructing and defeating the collection of revenue by the Department of the Treasury nor did he conspire to conceal the nature of the defendants' business activities and the source and nature of their income, nor did he participate in the filing of Roer's 1950 return or Koerner's or Alprin's 1952 returns.

Rokoff wrote the endorsement on the back of defendant Alprin's EG (Alprin's $500 check for his subscription to Tivoli stock) in Baltimore in late 1945 after the date of the check, October 3rd. He then made out a deposit slip and gave it to Klein. Rokoff believed that he made the initial two Tivoli deposits on November 20th, 1945 of $145,088.59 and $2,850, Government's 339.

Alprin's $500 check (defendant Alprin EG) was part of the $2,850 deposit, as was Rokoff's $150 check (defendant Klein's DX). The $2,850 represented contributions to the capital stock of Tivoli Trading Co., S.A. Rokoff never saw a Tivoli stock book or certificate #1 in Alprin's name.

[7241] Roer subscribed to Tivoli stock and paid for it by a check for $1,000 dated September 25, 1945 (defendant Roer's EH) which was part of the $2,850 deposit (Government's 339).

And that completes the portion of the Rokoff cross-examination still in evidence before you. And after a ten minute recess we will continue with the summary of his redirect.

Summary of Testimony Remaining in the Record

The Court: And now we come to the portion of the Rokoff testimony in redirect that was not stricken.

When Rokoff testified in connection with Government's 381, the balance sheets, and Government 379, the Regan Potter memorandum records, that his books balanced he meant that the total debits and credits balanced. This would not reflect improper posting of a credit as a credit but to the wrong account.

When Rokoff drew the Regan Potter balance sheet in Government's 381 the Regan Potter memorandum records (Government's 379) reflected commissions paid of $2,164,096.62.

Klein specifically told him to correct or change that entry and he did. No page of the Regan [7242] Potter memorandum records—(Government's 379—a bound book) shows commissions paid of $2,164,096.62. The entry on page 186 and 187 of $664,096.62 was made after the balance sheet was prepared.

This did not prove to Rokoff that Rokoff rewrote the Regan Potter memorandum record although he may have and could not remember it.

Rokoff made no entry in the Continentale memorandum records (Government's 377) of the 3 million dollar exchange with Cameron Stuart and crossed out the cash book entry thereof in Cameron Stuart memorandum records (Government's 378). He made no ledger posting thereof therein. These

books therefore do not accurately reflect the exchange.

Rokoff's instructions from Klein were of two kinds. One, generally re posting invoices. And, two, special situations which included entry of so-called sales expenses, commissions and royalties to the various other corporations of which Klein was president.

Although H. Harvey & Company has done no business since the jeopardy assessment in 1948 and Rokoff is presently the only employee Silver remained [7243] with the company until 1952 and this was after Klein moved from Baltimore to California. Rokoff still draws salary as office manager. He performs personal services for Mr. Klein. Although papers were sent to Cuba no liquor ever went there to Rokoff's knowledge.

So much for the Rokoff redirect, and that now brings us to that portion of the Rokoff recross which still is in evidence.

H. Harvey & Co., Limited went entirely out of business when the jeopardy assessments were filed in March 1948 for three years until with the Government's permission it in a short period liquidated its inventory and did no business since.

Rokoff since has attended to Klein's personal business.

Atlhough on redirect examination of Rokoff it appeared that in August 1952 Rokoff told McCarthy, an Internal Revenue agent, that he didn't recall seeing the Cuban books in Canada and in

September 1953 made an affidavit after a discussion with Rosenberg that he vaguely pictured them in Canada, Rokoff's best present recollection is a very vague mental image of having seen some books that he couldn't [7244] describe and couldn't name.

An incorrectly posted item to an account would make that account wrong even though the debits and credits balanced.

Rokoff never deliberately incorrectly posted an item while working for Klein or the companies with which Klein was associated.

As to the Cameron Stuart-Continentale 3 million dollar exchange occurring within a six-week period, had Rokoff entered the items in both sets of memorandum records it would not have changed the result in balancing those records. Rokoff did not recall and did not deny Klein told him that the original check from Cameron Stuart too, was a mistake.

Regan Potter, Tivoli and Waldorf who received royalties, sales expenses or sales commissions had nothing to do with the actual purchase and sale of whiskey.

The $11 difference on the Harwoods purchased in Canada at $8.05 a case and sold to Williams at $19.05 a case went into the treasury of one Panamanian and one Cuba corporation originally after which Rokoff had nothing to do with it.

[7245] Rokoff made entries of sales expenses, sales commissions and royalties as instructed by

Klein. Rokoff did not know the basis of these entries, except that they had nothing to do with the direct purchase and sale of whiskey.

That concludes the entire Rokoff testimony still in evidence before you, and concludes the entire oral testimony, except as the same may be reflected in statements of witnesses read from the stand.

Now we come to those statements.

Mr. Donohue: Are there not one or more omissions, your Honor?

The Court: I believe not. Which do you refer to, please?

Mr. Donohue: I am sorry, the other testimony is in in its entirety. I was thinking of the three witnesses whose testimony had not been stricken.

The Court: I indicated in view of the fact that the Bennett, Valverde and Baker testimony was left in in its entirety, I was not going to summarize it. But I repeat, at an appropriate time the jury may have that testimony read to them.

Mr. Donohue: I consider those the [7246] omissions. I now understand, your Honor.

The Court: We come now to the portions of the Koerner statements which were not stricken. I would remind you that although this statement was made after on or about June 1, 1946, it has been received as to all defendants.

On October 15, 1952—and I am now giving you a summary of a statement that was received as an exhibit, Government's 249—on October 15, 1952, Irving A Koerner was interrogated in connection

with the income tax liability of Hyman H. Klein at the office of the Enforcement Counsel of the Internal Revenue Bureau by Thomas J. Victory, and William F. McCarthy, Special Agents. Koerner was represented at that interview by his attorneys George Glassgold and Vincent Lewin.

He stated his name to be Irving A. Koerner; his residence to be Great Neck, N. Y.; his occupation to be, since September 1952, factoring of non-negotiable accounts receivable. He was sworn and advised that he need not answer any question that might tend to incriminate him.

Koerner stated that from 1943 to 1947 he was National Sales director of R. C. Williams & Co., [4247] Inc., in charge of the Liquor Division. He knew Hyman H. Klein since about 1941 or 1942.

Koerner stated that although he was permitted to purchase stock in 1945 in the Harwood picture, he was not an officer or director of any of the companies.

When shown a bank draft dated March 27, 1947 in the sum of $264,162.70 payable to La Economica Agencias (Government's 340) Koerner stated that although his handwriting did not appear thereon the draft was deposited to his account in the National City Bank.

Koerner identified La Economica Agencias as a corporation owned by Morris Alprin or part of his family, formed for the sale of Harwood's in foreign countries. Koerner never owned stock in it.

Koerner stated that the $264,162.70 draft represented his share of the liquidation or disposition of his stock in the foreign corporations purchased in 1945.

In 1945, in New York, Koerner gave H. H. Klein his personal check for $500 to Tivoli corporation for the purchase of Tivoli stock, a month or [7248] two after a discussion with H. H. Klein in the summer of 1945 in Klein's hotel room in Vancouver.

When Klein invited Koerner into the Harwood picture he instructed Koerner to make the check payable to the Tivoli corporation. While the specific arrangement was vague to Koerner it was along the lines that he would have a 3 per cent or 5 per cent interest in the companies dealing in Harwood's. Koerner did not receive a stock certificate for his investment, Klein having told him that Klein would hold all the stock in the corporations. This arrangement was all verbal. For his $500 check to Tivoli Trading Company Koerner received $264,162.70.

When asked if he rendered any services to Klein or his enterprises for these funds Koerner stated "I purchased stock." Koerner stated that he did not know why the draft was made payable to La Economica Agencias or who requested it. Even though it represented a return of his capital investment he didn't care to whom it was payable so long as he ultimately got the money.

Koerner was informed by Alprin in 1947, [7249] when Alprin received the draft and returned from Canada with it, that it was in liquidation of Koerner's share in the Harwood picture but no specific mention was made of Tivoli or any other corporation.

Alprin told Koerner that he was called to Canada and given two drafts, but Koerner did not know by whom. When Koerner demanded the check Alprin refused to give it to him stating that Klein told him not to do so. No accounting was ever shown to Koerner. He accepted the draft without knowing if he was entitled to more on the basis of the calculation of the $264,162.70 figure. Additional compensation was never discussed by Klein and Koerner.

Between September 1946 and when Alprin told Koerner that Alprin was holding the draft for Koerner, Koerner had only superficial undetailed discussions with Klein about the liquidation of his interests in the Panamanian and Cuban corporations.

Koerner actually received the draft in March, 1952. Koerner did not know why a bank draft was used. While the draft was being held from 1947 to March 1952, Alprin told Koerner that he [7250] was not authorized to release it "by the man who gave it to him and told him to hold it for him."

Koerner stated that H. H. Klein instructed Alprin not to issue the check to Koerner. No one suggested to Koerner that the sum be placed in the name of a Cuban corporation. Koerner did not seek

tax advice on reporting the draft. Koerner did not know who Tivoli Trading Corporation was.

When Koerner invested the $500 he did not know how many shares of Tivoli stock were outstanding, nor who its principals were, but he did know it was a Klein interest.

While Koerner understood that Alprin and Roer also invested, Klein never discussed these matters publicly and discussed only Koerner's investment with Koerner.

While Alprin held the draft during the five year period from the spring of 1947 to March 1952, Koerner constantly contacted Klein for it but Klein said he wouldn't release it but didn't tell Koerner why. Finally, when Koerner brought his lawyer Glassgold into the matter, the draft was placed in a vault under joint control of Glassgold and Alprin. Continued pressure caused Klein to [7251] authorize its release on March 12, 1952 under certain guarantees from Glassgold to Alprin.

Koerner stated that he had no knowledge of any cancellation of his subscription to Tivoli stock. When shown his receipts (Government's 388) he stated that the signature looked like his but that he didn't remember signing it nor could he account for it or remember the circumstances under which it came into existence, and Koerner denied that the $500 had ever been returned to him by Klein or his agents.

Neither Klein nor his agents or associates ever indicated to Koerner that he would receive any money in addition to the draft.

Koerner did not direct that the draft he made payable to La Economica Agencias nor did Koerner ask Alprin to obtain Koerner's share of the liquidation of Tivoli Trading Company.

Koerner read, corrected, subscribed and swore to a transcript of his statement on September 28, 1953.

That constitutes a summary of Government's Exhibit 249, which is the Koerner statement.

That brings us now to a summary of Govern- [7252] ment's 264, which is the first Alprin statement, because there are two. This statement by Alprin, unlike the Koerner statement, is received only as to the defendant Alprin.

On September 11, 1952 Morris O. Alprin was interrogated in connection with the income tax liability of Hyman Harvey Klein at the office of the Enforcement Counsel of the Internal Revenue Bureau by Thomas J. Victory and William McCarthy, Special Agents, and Clyde Dart, attorney for the Bureau.

He stated his name to be Morris O. Alprin; his residence to be Brooklyn, N. Y., and his occupation to be attorney at law in New York City. He was sworn and advised that he need not answer any question that might tend to incriminate him.

Alprin stated that he was Klein's attorney in negotiation of a contract with R. C. Williams Company, Inc. for the sale and distribution of Harwood's blended Canadian whiskies. The first discussions were had in the end of February and in March, 1944.

Alprin stated that in September or October 1945 at Klein's behest he made out a check for $500 [7253] to purchase stock in Tivoli Trading, a corporation about which he knew nothing.

Alprin received no stock, Klein stating that he (Klein) would hold the stock in escrow. Later Klein talked about Alprin getting into an oil deal in Canada, which, though profitable, Alprin was never let in. Klein never told Alprin how much Tivoli stock was held in escrow for Alprin's $500.

[7254] Alprin agreed to produce his cancelled $500-check to Tivoli.

The matter arose about August, 1945 when Alprin was in Canada looking over the plant. New buildings were being built. Klein offered to allow Alprin to buy into the companies and make some money. The investment being small, Alprin decided to go in and later made out the $500-check to Tivoli Trading.

Alprin later learned that in the distribution of Harwood's Klein operated many Cuban and Panamanian corporations which Alprin guessed was for tax liability.

Alprin stated that at the time of his interrogation (September 11, 1952) he did not know that Tivoli was a Panamanian corporation or who its stockholders, directors or officers were or anything about it. Alprin stated that he was never a director or officer of Tivoli, but that, even though he never received any stock certificate, he bought stock which Klein held for him and Alprin considered himself a stockholder.

Alprin said that there was no correspondence evidencing his arrangement with Klein. Prior to Alprin's giving Klein the check Klein did not mention anything about Tivoli but merely indicated that he would let Alprin [7255] buy some stock in the companies and be able to make some money. Alprin was to be in the family and have an interest in the corporation and/or corporations and Alprin didn't ask. Then Klein came and asked Alprin for a check made out to the particular corporation.

Alprin stated that, never having seen their books, known their organizations or officers or directors, he could not say what part Tivoli played in the Klein enterprises.

Alprin stated that he was an officer, or stockholder, or director of Cuban corporations between 1943 and 1952 that he organized, but of none which Klein organized or with which Klein was associated. Alprin organized four corporations of which he recalled the name of one, "La Economica Agencias S. A." and thought that another—"La Importadora Marte, S. A." might be one and that "El Aguila Exportadora, S. A." sounded familiar. He thought that the fourth was "Apollo."

Alprin stated that if those were the names, he was responsible for their formation under these circumstances: In the spring of 1946 when he and Klein were discussing conditions generally and that the R. C. Williams contract would terminate with the end of [7256] O. P. A. and that if that happened whether Williams or someone else would be the im-

porter, and the possibility of shipments through Central or South America when shipping, not available during the war, might again become available, Klein suggested that Alprin might get the agencies for some Central or South American countries and that Alprin organize some Cuban corporations to sell in Central or South America.

Alprin liked the idea and organized the corporations of which Alprin was the sole stockholder. The agencies never materialized and, although Alprin investigated other possibilities from time to time, the corporations never actually did any business.

Alprin stated that he was never in Cuba or Panama with H. H. Klein nor did he know whether Klein was there from 1943 to 1947. Alprin agreed to make the charters and whatever other books he had of these corporations available.

Alprin stated that Cuban bank accounts were maintained for the original $500-subscription to each corporation but that this capital was expended in paying a fee of $100 a quarter to the resident officer, an attorney, Dr. Alverde Abril, who had a partner, whose name Alprin could not recall.

[7257] Alprin stated that Economica also had an account in a bank in Canada to which was deposited a check for some $260,000 which Klein gave Alprin at the end of March or in early April, 1947, on liquidation of the Tivoli Corporation, and told Alprin to hold awaiting further disposition or details in connection with the liquidation. That money was held in the account in Canada subject

to Klein's instructions about being able to use it.

Alprin stated that Klein gave him the check in Klein's Baltimore office at the end of March or in early April, 1947, telling Alprin to hold it and not deposit it until Klein wound up the details and told him to do so. Within two or three weeks Klein told Alprin to deposit the check, which he did, and then Klein told him that all Canadian accounts of Cuban companies with which Klein was associated had been tied up and that account was tied up for two years. When the accounts were released, Klein sent Alprin to the Canadian bank where Alprin got a check for the funds made out to La Economica, which Alprin held until early 1952 when there was a discussion and Klein released it and Alprin deposited it to the corporation pursuant to bank requirements and then drew upon that account into his own [7258] account.

Alprin stated that when Klein gave him his check, he gave him another for Koerner in the same amount, both payable to Alprin's corporation, with instructions that Alprin also hold Koerner's until Klein instructed him to give it to Koerner. Koerner kept pressing Alprin for the check which Alprin refused to endorse or give to Koerner without Klein's assent and when Koerner, at the end of 1950, expressed doubt that Alprin had it and questioned Alprin's honesty an arrangement was made to put the check in a safety deposit box under the joint names of Glassgold (Koerner's attorney) and Haas or some member of his firm. Alprin instructed

Haas that the check was not to be released to Koerner or Glassgold until Alprin assented and this depended upon Alprin's instructions from Klein.

The safe deposit box was in a bank in the Chanin Building, where Haas' office was located, and Alprin was there when the check was given to Koerner after Koerner signed the necessary papers.

The release resulted from Koerner asking Alprin during 1951 for the check and Alprin stating that he had no instructions. Finally, in early 1952, after Koerner told Alprin that he had spoken to Klein, [7259] Alprin called Klein in California for confirmation and Klein authorized Alprin to deliver Koerner's check and for Alprin to use his check. Alprin then deposited his.

Alprin identified the original bank draft for $264,162.70, dated March 27, 1947, payable to La Economica Agencias deposited in the Canadian account of La Economica Agencias on May 5, 1947. From the La Economica Agencias Canadian account $95,000 was transferred by Alprin on May 5, 1947, to the account of La Importadora Marte and $79,162.70 was transferred by him on the same date to the account of El Aguila Exportadora because Alprin did not want to have a large balance in one account. He split it up so that Economica had $90,000, Marte $95,000 and Aguila $79,162.70.

No deposits or withdrawals were made in these accounts until they were released when they were withdrawn on February 10, 1949, in a total amount about $50 less than originally deposited. The $50

difference was a fee to a local accountant who, under local bank requirements, acted as assistant secretary or some officer. The withdrawal was in one draft which Alprin endorsed and deposited to La Economica [7260] Agencias in the 57th Street Branch of the Chemical Bank on March 7, 1952. On March 12, 1952, Alprin transferred the $264,112.64 to his personal account in the same bank. This technique was employed because the bank's attorneys would not approve the deposit of the bank draft to Alprin's personal account merely on endorsement. Although all papers were drawn simultaneously, the transfer was not made until the bank draft was cleared.

The 264,000 odd dollars was Alprin's personal funds, representing his share of the liquidation of the corporation or corporations in which Klein had asked him to buy stock. The funds were not paid to Alprin for any services rendered to Klein or to his enterprises.

Alprin did not know why nor had he ever instructed Klein to make the draft payable to La Economica Agencias.

Klein knew of Alprin's organization of his Cuban corporations because Rosenberg, who had assisted in their organization, told him, and Alprin also gave Klein the names of the corporations.

While Alprin did not know why Klein procured a bank draft for Alprin's share of the liquidation made out to one of the corporations, Alprin never asked him [7261] why this was done. Klein merely gave Alprin the check and told him to hold it.

Since March 7th Alprin considered the funds his, deposited them, bought government bonds and Treasury Certificates and was trying to pay his taxes on them.

There was no agreement, contract or understanding in any manner whereby sometime in the future Alprin would be required to return all or any part of the money to Klein.

Alprin accepted this large sum without questioning Klein and without a statement or figures and therefore did not know the basis of the calculations in arriving at the figure of $264,000. Even if Alprin had thought that more was coming to him, he would not have argued with Klein about it.

Klein asked Alprin for his bill but Alprin delayed rendering it because of Klein's general situation and tax problems and felt that after these were resolved he could get more for the substantial services he had rendered over quite a bit of time.

Although Alprin had speculated about the amount of his bill to Klein, reckoned it and was awaiting the outcome of Klein's pending matter to finally determine [7262] the amount. Alprin stated however that he was still to receive additional funds from Klein or his enterprises for fees.

The other draft to La Economica Agencias for Koerner's share of the liquidation held by Alprin was received from Klein at or about the time Alprin received his in March or April, 1947.

Alprin did not report this sum in his 1947 return because he reported on a cash basis and

did not consider the fund, conditionally delivered to to him by Klein, his until Klein authorized him to use it. Alprin did not know why Klein told him not to use the draft when he gave it to Alprin in 1947 nor did he know why Klein procured a bank draft instead of issuing a check of Tivoli or one of his enterprises in which Alprin invested the $500. Alprin did not ask for a bank check or that the check be made payable to him or any corporation. He simply accepted the draft tendered to him as his share of the liquidation. A short time before Alprin received the draft Klein told Alprin that Klein would let Alprin know when to come to Baltimore and when Klein would be able to wind up the company in which Alprin was interested.

Alprin stated that he thought he was the sole [7263] stockholder in La Economica Agencias and that after the incorporation of his Cuban corporations the interests therein were all assigned to him. No one ever suggested to Alprin that it would be a good idea to have the money payable to him placed in the name of a Cuban corporation.

Although Alprin did not report the receipt of this money in 1947 he did report it in his 1952 estimate and was paying the quarterly installments on that estimated 1952 income. Alprin stated that he intended to finally report the sum in his 1952 return as a capital gain on the purchase of stock. Alprin knew that how he reported the receipt had important bearing on the tax consequences on that large sum of money and although it affected him he was not inclined to cheat.

Alprin stated that in his opinion the facts as he stated them sustained his belief that the fund was taxable only as a capital gain and if he could get the help of other stockholders of Tivoli to prove his point, he would.

Alprin stated that even if he had reported the receipt in 1947 he would have done so as a capital gain, but had he used the money then he would have [7264] violated Klein's instructions.

Alprin stated that he trusted Klein when the latter said he would hold the stock for which Alprin invested $500, for Alprin.

Alprin did not know the extent of Klein's interest in Tivoli.

Alprin stated that Klein gave him the two $264,000 drafts in a little washroom adjoining his office in Baltimore. Klein gave Alprin no other drafts.

Alprin did not include any statement with his 1947 return of the receipt of the draft because it represented escrow monies. Although Alprin did not obtain an opinion on the taxability of the money in 1947, when Alprin told Haas, who prepared his returns, that he was holding his client's money and was not reporting it, Haas said, "That's right." Alprin did not remember if he told Haas the amount or that it was a bank draft.

Alprin stated that in addition to his and Klein's drafts he knew that one was given to Roer. While he did not know the amount of Roer's drafts, he knew it was more than his or Koerner's because he

later learned that Roer had gotten it and that Klein had asked [7265] Roer for $1,000. Alprin stated that he did not know of any draft to Haas under similar circumstances.

Alprin stated that the draft was not indicated by Klein to represent commissions on the sale of Harwood's Whisky.

Alprin stated that immediately prior to his depositing the draft, Klein asked him to do so in the Royal Bank in Toronto. Alprin went there with Haas who introduced Alprin to the bank manager and arranged for a relative, an accountant in Toronto, to act as secretary, for which Alprin paid him $50. Alprin, on his own judgment and without Klein's instructions, split the deposit into two other of his corporations. When the funds were unfrozen he withdrew them all, less the $50, by a draft to the original corporation. If one of the corporations did not have Alprin's son, a minor, as a stockholder, Alprin would have split the deposit among the four corporations.

Alprin endorsed Koerner's draft (Government's 340) "Pay to the order of Irving Koerner, La Economica Agencias, S.A., Morris O. Alprin, Treasurer." Alprin turned this draft, which was then in the joint custody of Glassgold, an attorney, and Haas, over to Koerner in February or March, 1952, when Alprin deposited his own.

[7266] Alprin did not know of any difficulty that Koerner may have had in negotiating his draft and did not recall what papers were given Koerner

with the draft, but stated that if any documents were executed by La Economica Agencias in connection therewith, he would have prepared and furnished them.

Alprin was informed that he could get a copy of his interview only if he signed it and was told by Special Agent McCarthy: "You have been a very cooperative witness."

Alprin swore to a transcript of the interrogation of October 21, 1952.

That concludes the summary of the first Alprin statement not stricken.

Now we come to the portions of the second Alprin statement not stricken. This statement, too, unlike the Koerner statement, is received only as to the defendant Alprin. This is Government's Exhibit 265.

On October 21, 1952, Morris O. Alprin was interrogated in connection with his income tax liability at the office of the Enforcement Counsel of the Internal Revenue Bureau by Thomas J. Victory [7267] and William F. McCarthy, Special Agents.

He stated his name to be Morris O. Alprin; his residence to be Brooklyn, N. Y.; and his occupation to be practicing attorney in New York City. He was sworn and advised that he need not answer any question that might tend to incriminate him.

Alprin testified that, as he had previously stated when he was interviewed on September 11, 1952, in connection with an investigation of Hyman H. Klein's income tax liability, he, Alprin, drew his

personal check for $500 in 1945, payable to Tivoli Trading Company, S. A. as an investment for which Klein held his stock in escrow. This was done after Klein had told Alprin that Alprin would be in the family and that Klein would give Alprin an opportunity to purchase some stock in the corporations.

Alprin, subsequent to that September 11, 1952 interview, had submitted to the Bureau the original and a photostatic copy of his $500 check (defendant Alprin's EG). That check represented his only investment in any of Klein's ventures from 1944 to 1947.

Although Alprin did not remember his invest- [7268] ment in Tivoli ever having been canceled, he did remember that in early 1952 Ellis Rosenberg showed Alprin a photostatic copy of an undated letter size page reciting receipt of a check for 264,000 odd dollars and also acknowledging receipt of $500 and containing some wording about a cancelation of the subscription to Tivoli stock.

Alprin stated that he told Rosenberg that the signature looked like his but that he would like to have a copy of it and to examine the original, which Rosenberg said he would permit but Alprin never got the copy and never saw the original.

Alprin stated that he never got the $500, nor was his stock subscription ever canceled, nor did he remember ever signing the receipt which was shown to him (Government's 388).

Alprin stated that his position at the time of the interview to be not inconsistent because in a liquida-

tion one frequently receives the return of the original investment plus the accumulated surplus or profit.

Alprin stated that although the receipt recited $500 which he never got, he having received no accounting, could not say whether the $500 was included in the 264,000 odd dollar figure.

[7269] Alprin could not state whether the additional wording acknowledging receipt of the 264,000 odd dollars shown to him by Rosenberg in early 1952 was on the same sheet as the receipt for the $500 (Government's 388) or on a separate sheet, because he never saw the original.

Alprin stated that when Rosenberg exhibited the photostat to Alprin, Rosenberg stated that Alprin had signed it when he got the draft.

When Alprin gave Klein the $500 Alprin signed no papers. He merely had his secretary make out the check to the name which Klein gave him.

Alprin stated that during February or March 1947 Klein in conversations in Alprin's office or Klein's hotel in New York or when Alprin visited Klein in Baltimore, Klein spoke to Alprin, with no one else present, about liquidating Alprin's interest in Tivoli. Then either in New York or by telephone call from Baltimore, Klein told Alprin that he had been able to wind up the Tivoli matter and for Alprin to come to Baltimore.

Alprin stated that he went to Baltimore, but could not fix the date, and in the small washroom in Klein's office in the middle of the day [7270] received two drafts made out to La Economica

Agencias (Government's 340) which Klein told him were his and Koerner's shares of the Tivoli liquidation. This was the first time that Alprin knew that Koerner was interested in Tivoli.

Alprin stated that Klein told him to hold both the checks until Klein gave him further instructions regarding them; that he had some details to clear up. Alprin stated that, although not sure, he recalled Klein having mentioned an OPA action against R-C. Williams and a subpoena having been served on one of his corporations at the time. Although Alprin did not remember the details of his conversation he distinctly remembered Klein's having told him to hold the checks until further instructions and not give Koerner his check. Alprin obeyed these instructions.

Alprin did not recall how he went to Baltimore and fixed the time based upon the date of the drafts as shortly after March 27, 1947. He was sure Koerner was not there but did not remember if Roer or Haas were.

While Klein usually had Rokoff and a girl in the outer office, Alprin could not remember if they [7271] were there that day.

Alprin stated that he went to Cuba with his wife and family at the end of June or beginning of July 1946 and organized four corporations. He met Roer and Koerner and their families and Rosenberg in Cuba then.

About two months before Alprin went to Cuba, when there was talk of the end of OPA, in conversations which Alprin had with Klein in either

New York or Baltimore, Klein told Alprin to go to Cuba and to form Cuban corporations for himself and his family to engage in Central, South American and other exploitation of Harwood's and other whiskies; that if OPA ended there might have to be a substitute agent in the United States for Williams; that Rosenberg would be in Havana to assist him. Alprin arranged to go. He later learned that Klein had had similar conversations with Roer and Koerner.

When Klein directed Alprin to go to Cuba and to form the corporations, no one else was present.

Alprin organized the Cuban corporations through a Cuban lawyer named Dr. Alberto Abril, whose then partner, Swaresi, looked at the document. Alprin, Koerner and Roer, who formed their corporations [7272] at the same time, met Dr. Abril through Klein's lawyer, Dr. Cubas, of Dr. Moran's firm. They each formed four corporations. It was there that Koerner and Roer told Alprin of their similar conversations with Klein about opportunities to sell whiskies which Klein either owned or controlled in Central and South America.

The only business done by Alprin's corporations was to pay the lawyer, which exhausted all of their capital. Koerner and Roer told Alprin the same about their corporations.

While Alprin discussed his corporations with Haas generally, Haas never advised, directed or helped Alprin to organize them.

Regardless of the purpose of their formation, Alprin's corporations never did any business. There

was no argument between Alprin and Klein that funds due Alprin for his efforts in the Harwood deal would be channeled through these corporations because they needed little capital, it being intended that they operate on a letter of credit basis.

Alprin stated that he never requested Klein to make any payments due Alprin to any Cuban corporation, that Rosenberg had the names of all of them.

[7273] If Alprin received any money from Klein and the corporations would need capital he would have put it in.

Alprin did not report the $264,162.70 in his 1947 return because, reporting on a cash basis, he did not receive the money in 1947. In preparing his 1952 estimate Haas' firm, as his accountants, included it in the original or an amended estimate in computing his estimated tax and Alprin paid his quarterly installments on that basis.

On May 10, 1947, after Klein told Alprin to deposit the draft, Alprin and Haas went to the bank in Canada, deposited the check into the La Economica Agencias account and then transferred some of the proceeds from that account into the accounts of two other companies. Nothing went into the fourth because Alprin's son, a minor, was a director of it.

Klein told Alprin that the funds of these Cuban corporations were tied up for two years by the Canadian Government as were all Cuban corporations with which Klein was directly or indirectly identified.

In early 1949 Klein told Alprin that the [7274] funds were released and to go to Canada and get a bank draft for them and hold it until further instructions.

When Alprin went to Canada with Haas to deposit the original draft, Alprin from conversations with Haas, believed that Klein had told Haas the same things he had told Alprin. Haas introduced Alprin to the bank manager and arranged for Mr. Davis to act as a local officer to whom notices could be sent and Alprin paid Davis $50.

When Alprin returned from that original trip to Canada he reported what had been done, to Klein personally, and doubted that anyone else was present.

When Alprin closed the Economica, Marte and Aguila accounts on February 10, 1949 he procured one draft for $264,162.70 less $50.06 made payable to La Economica Agencias, the same as the original draft, less the $50 to Davis and the cost of a Canadian stamp.

Alprin could not explain Klein's interest in the money after Alprin cashed the original draft on May 10, 1947; all Alprin did was to follow Klein's instructions. However, drawing the checks on the [7275] Economica account, after the initial deposit of the draft and splitting the funds into three accounts was done by Alprin on his own notion without any instructions so to do from Klein.

Although Alprin could have withdrawn this money on his own signature at any time, he did not consider it his until Klein gave him unqualified

use of it and until then it was escrow subject to Klein's instructions, and although he considered it his share of the Tivoli liquidation he did not believe he could use it until Klein told him the liquidation was complete and that he could use it.

Alprin did not regard himself as any less than an escrowee because on his own responsibility he split it into three accounts all in the same bank where Klein had told him to deposit it.

Alprin got none of Klein's instructions in writing. Had Alprin used any of the money personally before Klein told him it was his, Alprin would have violated a trust.

The money did not represent payment to Alprin for legal services between 1943 and 1947.

Alprin's check is his only written memorandum to sustain his reporting the sum received [7276] as a capital gain.

When Alprin received Koerner's draft from Klein in Baltimore he did not do so upon any request from Koerner.

Alprin stated that if he had control of the money for the years it was on deposit he would not have let the opportunity to use it, at least to earn interest, go by.

Alprin read a transcript of the interview and swore to it on December 9, 1952.

We will adjourn now until 2.15.

(Recess to 2.15 p.m.)

[7277] AFTERNOON SESSION

(Jury present.)

The Court: Now we come to a reading of the portions of the statement of Albert Roer not stricken. Now this was received not as an exhibit but as the transcript of the reporter's notes taken at the time, and this statement is received as against all defendants.

On October 23, 1952, Albert Roer was interrogated in connection with the income tax liability of Hyman H. Klein, et al, at the office of the Enforcement Counsel of the Internal Revenue Bureau by William F. McCarthy and Thomas J. Victory, Special Agents. Roer was represented at that interview by his attorney, George Glassgold.

He stated his name to be Albert Roer; his residence to be New York City; his occupation to be factoring as Dale Factors, Inc., and his office address in New York City.

He was sworn and advised that he need not answer any question that might tend to incriminate him.

Roer stated that he knew Hyman H. Klein.

Roer stated that he did not know who the stockholders were in the foreign corporation or corporations who had contact with R. C. Williams in the [7278] sale of Harwood's Whiskey in the United States but he knew that he was supposed to have a 10 per cent interest in those corporations.

Summary of Testimony Remaining in the Record

When exhibited a Royal Bank of Canada draft for $272,423.62 dated March 27, 1947 and made payable to Compania Fernandina Exportadora, S. A. (Government's 340) Roer stated that, as president of that Cuban corporation, which was his, he endorsed and deposited the draft in the New York agency of the Bank of Nova Scotia.

Roer stated that he organized it about June, 1946; that $500 in capital stock was issued, all to him; that he did not know who the directors and officers were except that he thought a Cuban lawyer might be and he knew that he (Roer) was the president.

Roer stated that at H. H. Klein's suggestion Roer went to Cuba and formed four corporations. He could not recall the names of the others but agreed to look them up and furnish them and the dates of their incorporation.

Roer stated that Compania Fernandina never functioned, never sold goods or performed services, never conducted any business, no longer existed and that he thought it had been liquidated and that he [7279] didn't know what happened to it.

Roer stated that Klein was not sure what the functions of the corporations would be when Klein told Roer to form them for possible use at a later date.

Roer stated that the $272,423.62 draft was given to him by Klein in partial liquidation of Roer's 10 per cent interest in the foreign corporations that made profits on Harwood's. It was a partial

liquidation of some of these corporations which Klein said had been liquidated.

Roer did not remember requesting that the draft be drawn to Fernandina and did not know why it was done.

Roer stated that Klein called him to Klein's office in March, 1947, handed him the check, told him it was in partial liquidation of some of the corporations that were liquidated, not to deposit it but to hold it until Klein would tell him to deposit it, and that at a later date Roer would receive an accounting and the balance due him on the 10 per cent liquidation.

While no one else was present when Klein gave him the draft Roer had gone to Baltimore with Morris Alprin and they returned together, but Roer did not discuss the draft with Alprin, nor did Alprin tell [7280]Roer why he (Alprin) made the trip.

Roer signed no papers when he got the draft and Klein told Roer that it was made out to the Cuban corporation because Klein thought it best that way and Roer just took it. Klein did not say why he thought it best to make the draft out that way.

No one ever suggested to Roer that it would be a good idea to have funds due him personally placed in the name of a corporation.

Roer did not know the basis of calculating the $272,423.62 because he did not receive any accounting, but he imagined that a lot more was due him.

(Discussion off the record.)

Summary of Testimony Remaining in the Record

The Court: Roer stated that on three occasions he asked Klein for an accounting and the balance of his 10 per cent of the liquidation and Klein told him that when Klein's income tax problem was straightened out he would take care of it.

Roer stated that his claim to a 10 per cent interest in the Harwood deal arose under these circumstances: At a conference in Winnipeg in 1943, Roer, H. H. Klein, I. J. Klien and A. L. McLennan discussed the possibility of selling Harwood's in the United States. Klein told Roer that he had an agreement [7281] with a Canadian company to buy Harwood's at $9.05 a case and that Roer was to appoint the United States distributor who would handle it at $19.05 a case. When Roer asked Klein what Roer's deal would be Klein told Roer that Roer would have a 10 percent interest in the foreign corporations, that Roer would have to buy stock, and that Klein would let Roer know later how much Roer's check would have to be for the stock. I. J. Klein and A. L. McLennan were present when Klein made that statement to Roer.

Roer had nothing in writing to establish his 10 per cent interest and could not say whether I. J. Klein and McLennan would confirm Roer's statement, nor had Roer sought written confirmation of his version. Roer later posted the money for the stock.

After Roer deposited the $272,423.62 draft to Fernandina in the Bank of Nova Scotia on March 27, 1950, he withdrew varying amounts therefrom to his personal account in the same bank.

Roer stated that all he knew about Tivoli Trading Company was that it was the corporation to which he made out a thousand dollar check and that it was supposed to have bought Harwood's in Canada and sold it in the United States.

[7282] The check that Roer made out (Defendant Roer's Exhibit EH) was his personal check to Tivoli Trading Corporation, S.A., in September, 1945.

Roer stated that the $1,000 check was for a 10 per cent stock interest in the corporation that was buying and selling Harwood's by which he said he meant not only Tivoli but several corporations that Klein told Roer he formed. Roer gave Klein the check to Tivoli because that was what Klein asked for. Roer gave Klein the check personally in Klein's office in Baltimore, no one else being present. Roer did not know where Tivoli Trading Corporation was incorporated, how much of its capital stock was issued, nor who its stockholders were.

Roer stated that although Klein promised, but not in writing, to hold Roer's stock in trust Klein did not issue the stock.

When shown a photostat of a document stating that the $1000 stock subscription had been repaid in full (Government's 388) Roer identified his signature thereon but did not recall having signed it.

Roer had no stock certificate of Tivoli, Klein having told Roer that he would hold it in trust and pay Roer 10 per cent when the corporation or corporations [7283] were liquidated. Roer never had

the stock physically in his possession, nor was it ever placed in escrow, nor was it ever issued to any person who had a power of attorney from Roer or who acted as his fiduciary.

Roer learned from conversations that Koerner and Alprin were also supposed to have stock in the corporation or corporations and that each had invested $500 in Tivoli. He had also learned that each had received a bank draft for over $250,000 but could not explain why Klein gave them that amount on a $500 investment while he got $272,000 on a $1000 investment.

Roer did not report the $272,423.62 on his 1947 return because upon Klein's instructions he did not deposit the draft until 1950 when he did report it.

While Roer received the draft in 1947 he did not discuss with anyone his possible 1947 tax liability on it, he just put it away and held it until Klein told him to deposit it. Not having deposited it, Roer didn't declare it.

Roer stated than when Klein gave him the draft in 1947 and told him to hold it Klein said something about having a little trouble on his income tax and that as soon as that was straightened out Klein would want Roer to deposit the draft. Klein did not explain [7284] what his difficulty was. Roer reported the $272,423.62 as a capital gain on his 1950 tax return after discussing it with and giving the details to his accountant, Samuel Arthur of 521 Fifth Avenue.

Roer identified his signature to his 1950 return (Government's 348) and the schedule of capital

gains and losses attached thereto. The only document Roer had establishing his purchase of the stock was the $1,000 check which contained no recital of the purpose for which it was given.

Roer had no agreement with Klein that funds due Roer for his efforts in the Harwood deal would be channeled through the Cuban corporations which Klein had suggested Roer form nor did Roer desire to do so to gain any tax benefits.

Roer met Koerner, Alprin and Rosenberg in Cuba in June, 1946, when he, Koerner and Alprin each organized four corporations.

Roer was suing Klein for Roer's claim to the balance of his 10 per cent. He commenced the suit about three months before the interview when, after several years of asking Klein in Canada and New York for an accounting and the balance, Roer couldn't get anywhere with Klein except to be told to wait until [7285] Klein straightened out his income tax.

The suit was filed against H. H. Klein, I. J. Klein, McLennan, Norgan and their corporations.

Roer agreed to supply any correspondence evidencing his demands upon Klein prior to the suit.

That concludes the portions of the Roer statement still in evidence and we are now brought to portions of the statement not stricken of Maurice A. Haas. This statement is received only as to the defendant Haas.

[7286] On November 20, 1952 Maurice A. Haas was interrogated in connection with the income tax

liability of Hyman H. Klein at the office of the Intelligence Division of the Internal Division of the Internal Revenue Bureau by Thomas J. Victory and William F. McCarthy, Special Agents, and Sidney Manster, Assistant Enforcement Counsel, and John Green, Technical Adviser.

He stated his name to be Maurice A. Haas; his residence to be Mt. Vernon, New York; and his occupation to be attorney and certified public accountant in New York City, in the firm of Haas, Schlesinger and Mayers. He was sworn and advised that he need not answer any question that might tend to incriminate him.

Haas stated that he knew Hyman H. Klein and first had connection with Klein interests in April, 1944. He also knew Morris O. Alprin, one of Klein's attorneys, who, as attorney for Agencias Distiladores, a Klein interest, requested Haas in March or April, 1944 to furnish a tax opinion regarding a proposed agreement between Agencias Destiladores, a Cuban corporation, and R. C. Williams, a domestic corporation, for the sale and distribution of Harwood's Whiskey.

Alprin asked Haas over the telephone if Haas would furnish an opinion and Haas said that he would if [7287] he saw a copy of the proposed agreement. After receiving a copy of the proposed agreement from Alprin, Haas, investigating the authorities, gave an opinion in April 1944 based on the telephone conversation with Alprin and on the proposed agreement. Haas identified his signature

to a photostat of the opinion dated April 17, 1944 (Government's 8). Haas when shown a photostat of supplemental letter agreement between R. C. Williams and Agencias Destiladores, dated April 20, 1944 (Government's Exhibit 5) stated that he had never seen it before.

Haas was shown a photostat of another tax opinion on his firm's letterhead dated February 27, 1945, addressed to Agencias (Government's 358).

Haas stated that the second tax opinion (Government's Exhibit 358) was also requested by Alprin either in a personal interview or by telephone. It was addressed to Agencias Destiladores at Alprin's request. Alprin had not consulted Haas between the first and second opinions about the Harwood matter. The second opinion was not induced by any specific situation that Haas knew about; it was only a check on the first nine months' operations of the company as Alprin presented them to Haas and as Haas repeated them in the [7288] first paragraph of the second opinion. Other than what Alprin told him and as he stated them in the first paragraph of the second opinion, Haas knew nothing of the operations of the Harwood whiskey deal.

When Klein gave Haas the various trial balances (Government's 381) Klein told Haas to omit Tivoli out of the combined statement since it didn't belong there. Klein gave no reason for the statement and gave Haas no figures on Tivoli, and Haas did not ask for any. The December 31st statement

was prepared on January 16, 1947 and at that time Haas had no knowledge of what funds were on deposit to Tivoli. Klein told Haas about the time the combined statement was prepared that Tivoli was not part of the combine, that he, Klein, had purchased the Canadians' interest in Tivoli for $375,000 and that it belonged to him.

Haas could not recall whether Klein told him that he purchased Tivoli after Tivoli had repaid the $1,500,000 loan to Regan Potter but he did recall that all transactions, i.e., the purchase of Tivoli and the sale of the other stock were completed at one time. While he couldn't fix the exact date, Haas stated that he knew it was in 1947 because Klein took his profit that year and they reported it on a declaration for [7289] 1947.

Haas prepared and signed Klein's 1947 return (Government's 356). The insertion that the return was "in accordance with advice and instructions of counsel" was suggested by McGuigan and Kilcullen after Klein consulted them and they advised Haas that disclosure of Klein's purchase of United Distillers stock, when he sold his other stock, did not belong in the return. Haas was doubtful about it and therefore consulted them. Haas' ordinary office routine of computation, typing and checking was employed in the preparation of the return. Haas prepared the return and the capital gains and loss schedule from records submitted to him by Klein. These records were kept by Klein's bookkeeper who made an extract from a personal ledger which he

kept and from the extract made a summary. Haas examined Klein's personal ledger when he prepared the return. It disclosed income, disbursements, a record of Klein's investments, a record of sales of securities, one page for each security. Haas saw purchase and sales advises, stock exchange items, but not of the Harwood business. Data about Waldorf, Seaboard, Regan Potter and Kirby & Kirby came from the ledger.

Haas stated that the rider about Tivoli [7290] Trading Company and Hannes & Co., attached to Klein's 1947 return, was phrased by Klein's attorneys, but he could not recall whether it was McGuigan & Kilcullen or Root, Ballantine, because there was a switch in attorneys at about the time the return was prepared. The rider was intended to give the Government notice of the planned but incompleted liquidation of Hannes & Co.

Haas stated that Tivoli Trading Company was a Panamanian corporation whose issued capital stock he could not recall, but prior to Klein's acquiring the Canadians' 75 per cent was owned four ways just as the others were. Haas stated that he had been told by Alprin, in 1947, or 1948, when he made out Alprin's 1947 return, that Alprin, Roer and Koerner had an interest in Tivoli. When Haas asked Alprin how that was possible, Alprin said that their share, whatever it was, was included in Klein's 25 per cent. Haas did not ask Klein about Alprin's statement. Haas stated that Tivoli and Hannes had no business but they did have funds which came

from the Harwood enterprise and about which Haas learned in preparing the figures and in talking to the principals.

Haas stated that he learned from Alprin in [7291] either April or May, 1947, about Tivoli having the two $264,162.70 bank drafts issued on March 27, 1947, to La Economica Agencias, a corporation belonging to Alprin. Alprin told him that one was for Alprin's interest in Tivoli and the other was given to Alprin to hold for Koerner. Haas was told that Klein handed Alprin the drafts in Klein's office.

Haas did not discuss the formation of Cuban corporations with Alprin.

Haas stated that Alprin told him, after Alprin got his draft, that Klein intended, after he sold out, to go into business again on the same procedure that had proved so successful and that he was going to take in Alprin and others. When Klein delivered the draft to Alprin he told Alprin not to use it until Klein told him. Later Klein told Alprin to deposit the draft in Canada but still not to use it. Then the Canadian accounts were blocked and were not released until February, 1949. Alprin obtained a new draft, but was again told not to u. these funds, and they were not unconditionally released to Alprin until January or February, 1952.

Haas stated that he believed Alprin's story because in 1947 Klein had told Haas that he planned to go into business again, which he could not do in 1946, [7292] because he was tied up with the Wil-

liams and U.D.L. contracts, and that when he did Haas would be given an opportunity to make some money by taking over one of Roer's corporations to which Klein would lend $35,000. Roer did turn over the corporation and Klein did lend it the $35,000 with the proviso that Haas not use the money but deposit it in Canada until Klein told Haas what to do. Klein told Haas that business would be thrown into the corporation, it would make money and repay Klein his $35,000 loan. Klein told Haas that he was not ready to start in business and that Haas was not to use the funds.

Haas stated that, based on his experience, he believed what Alprin told him about Klein's restrictions on the Alprin and Koerner drafts. Haas stated that Klein had control over the money he gave Haas and therefore Haas believed he had control over the other drafts.

Haas stated that even though Alprin's was a bank draft negotiable by Alprin, it had been given with an oral restriction and not taxable to Alprin until that restriction was removed.

Alprin told Haas that Klein gave Alprin Koerner's draft because Klein did not trust Koerner [7293] to carry out his instructions.

The corporation which Roer transferred to Haas and to which Tivoli Trading Company transferred $35,000 was Compania Commercial La Ribera. When Haas received the $35,000 check from Klein he was told to deposit it in Canada and await Klein's further instructions. Then the account was blocked.

When it was released in February, 1949, Haas obtained a new draft from the bank and offered it to Klein who refused it and told Haas to keep it. Haas did so, liquidated the corporation and reported his share on his 1949 tax return. Haas identified a photostat of a Tivoli check for $35,000 dated February 24, 1947, to Compania Commercial La Ribera and deposited March 19, 1947.

Compania Commercial La Ribera which was organized in the summer of 1946 was acquired from Roer for $800 for the benefit of Haas' accounting firm. Klein, without instructions from anyone, but having ascertained the corporate name from either Haas or Roer, issued the Tivoli check to La Ribera.

When Haas tendered Klein the return of the $35,000 Klein told Haas, as near as Haas could remember after four years, "You keep it, I don't want any part [7294] of it." And Haas kept it.

La Ribera did no business.

Haas reported the $35,000 as a capital gain. The forgiveness of indebtedness from a Panamanian corporation to a Cuban corporation was not taxable in the United States, but the liquidation of the Cuban corporation was taxable as a capital gain.

Although Tivoli loaned La Ribera the $35,000, no evidence of indebtedness was given for the loan.

[7295] Haas's interrogation was continued by Special Agents Victory and McCarthy on November 21, 1952.

Although Haas and his partners divided the $35,000 it was not recorded as a fee for services by

the firm because they had not rendered services worth that amount.

Haas got the $35,000 from Klein in Klein's office in Baltimore but he did not recall if anyone else was present. Prior to March 15, 1948, when Haas prepared Alprin's return, Haas asked Klein in Haas' office about the 264,000 odd dollar draft to Alprin and Klein told him to ask Alprin about it. Haas did and Alprin told him about Klein's instructions when he gave Alprin the draft.

Haas stated that Alprin told him that, in March, 1947, Klein took Alprin into a closet and gave Alprin a draft for $264,162.70 payable to Alprin's corporation, La Economica Agencias, which represented Alprin's share of the liquidation of Tivoli. Haas later learned it was a bank draft. Haas knew of no correspondence that would reflect the restrictions placed on the use of the draft, but Alprin told Haas that he had written Klein about the draft in 1952 but [7296] Haas had not seen that correspondence.

Haas stated that he had no recollection of having seen Alprin's draft of La Economica. The endorsement on that draft indicated its deposit to La Economica's account in the Canadian bank on May 5, 1947. Haas identified M. M. Davis, an accountant of Toronto, Canada, whose recent address he did not know, as his cousin. Haas thought that Davis acted as assistant secretary of La Economica Agencias, for which Haas was told he received $50, and Davis signed the corporate resolution relating to its

account. Haas could not recall who procured Davis' services, but he thought it was Alprin.

Haas was at the Toronto bank with Alprin on May 5, 1947 when the account was opened through Haas.

Haas thought that $95,000 was transferred from the La Economica Agencias account on May 5, 1947 to an account opened in the name of La Importadora Marte, S.A.

Haas believed that $79,162.70 was transferred to another new account of El Aguila Exportadora, S.A., on the same day.

Haas believed Marte and Aguila to be Cuban [7297] corporations owned by Alprin and that Alprin had sole signing authority over these accounts. Nevertheless, Haas stated his opinion to be that Alprin did not have full control of those funds because of the restrictions Klein imposed on them when he originally gave them to Alprin.

Haas stated that he did not know whether Alprin split the funds on his own initiative or on Klein's instructions, although, being there at the time, Haas knew that Alprin did it.

The deposits were made in Canada because Klein directed it—that was the way Klein liked to do business.

The $35,000 was not loaned to Haas. It was loaned by Tivoli to La Ribera although Klein at the time stated that he would loan Haas the $35,000 so that Haas could be part of the business structure. Haas would not accept a loan to himself—it was a corporate loan to a corporation that they owned.

Klein subsequently so stated and was instrumental in having Roer turn the corporation over to Haas.

Davis was a dummy whose only participation was to introduce Haas to the bank manager.

Haas explained his participation in the [7298] events surrounding the Koerner draft to be that until early 1951 Koerner was content that Alprin hold Koerner's draft according to Klein's instructions. Then Koerner wanted the draft but Alprin would not surrender it unless Klein consented and Klein would not consent. It was then agreed that Koerner's lawyers and Haas' firm hold the draft in escrow jointly in a safe deposit box accessible to both. This arrangement prevailed for about a year when in early 1952 Haas' firm was told orally by Alprin to release the check to Koerner's attorney, and they did.

Haas received a $200 fee from Alprin for his 1944 tax opinion and a $500 fee from a source he could not recall for his 1945 tax opinion.

Haas had no record of nor did he recall meeting H. H. Klein, Rosenberg and Rokoff in Montreal or Toronto in March, 1947.

Haas and his partners, Schlesinger and Mayers, each reported one-third of the $35,000, less the cost of the stock, as a capital gain, on the liquidation of La Ribera in 1949.

Haas believed the Cuban Government dissolved La Ribera.

[7299] The check which Haas offered Klein in 1949 was drawn to the order of La Ribera. The offer was informal in that Haas asked Klein what

he wanted done with it. Haas considered this a return of the loan because he knew the business would not be carried on. Klein refused the check and told Haas to do what he pleased with it.

Haas stated that he knew that until 1952 Klein had not divulged the names of the recipients of the drafts. Because of his knowledge of Klein's tax case, Haas learned in 1951 that Klein, thinking that the settlement of the case was imminent, stated that, by not divulging the names of the recipients, Klein would have to pay a capital gains tax on those sums and that it was a good thing that the drafts were being held so that he could get the money back.

Haas said that Klein repeatedly made these statements in talking about his tax matter, but Haas couldn't say exactly where and when.

Haas thought that Klein might have made the statements in the presence of Rosenberg and might have discussed it with McGuigan and Kilcullen, but not in the presence of Silver or Rokoff.

[7300] Klein never said that the drafts were payment for services rendered by the individuals.

That concludes the summary of the portion of the Haas statement not stricken.

That brings us now to the summary of the final statement and final summary, the portions of the statement of Klein that were not stricken. This statement was received only as to the defendant Klein and also was in the form of a recital of the stenographers' minutes.

On November 26, 1952, Hyman H. Klein was interrogated in connection with his income tax

liability at the Intelligence Division of the Internal Revenue Bureau by Thomas H. Victory and William F. McCarthy, Special Agents, and by Clyde Dart, Attorney in the Enforcement Counsel's office, and John Green, Technical Adviser, Appellate Division. Klein was represented at that interview by his attorneys, E. G. McGuigan and Richard Kilcullen.

He stated his name to be Hyman Harvey Klein; his residence since 1951 to be Los Angeles, California, and formerly Baltimore; his occupation, exporter and importer; and his office address in Baltimore, [7301] Maryland. He was sworn and advised that he need not answer any question that might tend to incriminate him.

He stated that he was in the liquor business for more than 30 years in the United States and Canada. He was associated with and president of U. D. L. of America, a distiller and seller of whiskies, located in Baltimore, which was a subsidiary of U. D. L. of Canada, Limited, Vancouver, B. C.

Klein stated that he sought tax advice pertaining to United States tax liability of any profit derived from the Harwood venture, during or immediately after the negotiations between Agencias and R. C. Williams and Co., Inc. by originally speaking to Morris Alprin, who directed the question to Maurice A. Haas of Haas, Schlesinger & Mayers.

Klein stated that he gave Alprin information orally and that Haas had the Agencias-Williams contract in proposed form and after Haas suggested certain changes in final form.

Summary of Testimony Remaining in the Record

Klein stated that he received Haas' tax opinion of April 17, 1944 (Government's 8) and that he could not recall Haas having made any other recommendations or suggestions affecting the contract not [7302] reduced to writing.

Klein stated that he did not recollect but imagined that Alprin and Haas were apprised of the provisions in the supplemental agreement between Agencias and Williams, dated April 20, 1944 (Goverment's 5).

Klein stated that Tivoli Trading Company, Limited was a Panamanian corporation organized in April 1945 as an investment company and also one in which certain commissions and expenses were paid out. It did not buy and sell goods. It performed no services for any individual and none for any corporation other than those in the Harwood deal. It was the medium by which payment was made on behalf of others for charges made out against that company.

Its issued capital stock was 2852 shares. H. H. Klein, I. J. Klein, George W. Norgan and A. L. McLennon each owned 713 shares. Stock certificates were issued to H. H. Klein, but he could not recall whether they were issued to the other stockholders.

Klein identified three stock certificates of Tivoli, exhibited to him, as covering 2851 shares in his name but stated that they were held for the [7303] beneficial owners in the proportions previously mentioned, namely, that I. J. Klein, Norgan and McLennon owned 75 per cent of the stock. Klein could not

recall why stock certificates were not issued to them for their interests in the company. They owned 75 per cent of the stock from the inception of the company until H. H. Klein got full possession.

Rosenberg, Alprin, Roer, Koerner, Silver, Rokoff and Lechtzier were offered an opportunity to subscribe to Tivoli stock which they did but the subscriptions were not accepted.

Klein stated that when the success of the Distillers Agency venture became apparent, it was decided to compensate the men who had contributed to that success. This was to be done by forming a corporation in which these men could share in varying amounts. Some days or weeks after Rosenberg had subscribed to his stock, when he was told the purpose of the arrangement, he advised against it. Thereupon, the company did not accept their subscriptions and Klein returned their money and at Rosenberg's suggestion got receipts from them.

When the seven were originally invited to [7304] subscribe they were to have only an interest in Tivoli as a bonus and not in the entire Harwood venture.

Klein accounted for the deposit on November 20, 1945, into the Tivoli bank account of the checks of the seven intended subscribers aggregating $2850, by stating that in paying them back their subscriptions he had in effect bought their checks. He could not recall whether the payments were made by him to them before or after the deposit.

Ellis Rosenberg composed the receipts for the repayments made by Klein and they were all identical

(Government's 388 and 389). Each subscriber was notified of the cancellation of his subscription by Klein personally when he repaid each in cash and obtained the signed receipt in Baltimore and New York.

[7305] Although none of the receipts was dated this omission was not intentional and none of the subscribers were forbidden to date them nor did Klein recall any having attempted to.

Klein stated that no subscriber objected to the cancellation of his subscription and nothing was promised any of them for his cancellation.

When shown page 6 of a book stated to be a journal of Tivoli Trading Company containing entry of a charge dated December 31, 1945, of $785,475.70 to Commissions Payable and an offsetting credit to Accrued Commissions and Expenses Payable in like amount, Klein said they may have been bonuses or expenses that could not then, without refreshment, state to whom specific amounts were paid. He did however recall Roer, Alprin, Koerner, Lechtzier, Rokoff, Rosenberg and Silver in the category and stated that there may be others he could not at the moment recall.

Klein stated that a similar entry on page 11 under date of September 30, 1946 for $523,650.47 were not commissions for services in selling Harwoods but were essentially a bonus for some job that might have been well done.

[7306] Klein could not, without refreshment, tell the purpose of an entry on page 13 reflecting a

payment by Tivoli to Comercial La Ribera on February 24, 1947 of $35,000 and charged to Accrued Commissions and Expenses. He identified Comercial La Ribera as a company owned or partially owned by M. A. Haas.

Klein stated that the commissions or bonuses were not paid in 1945 and 1946 because the operation was still going on and there was no obligation to pay anybody.

Klein could not recall having told Roer to turn Comercial La Ribera over to Haas, knew of no reason to have done so.

Klein did not know whether the money charged to Expenses was a payment or a loan and did not know why the payment was made to La Ribera although he didn't doubt that he directed Rokoff to make the entry. Even though charged to the Accrued Commissions and Expenses Account in the Tivoli book Klein denied that it could not have been a loan although it was not entered on page 7 of the Tivoli book where a $15,000 loan to Rosenberg on March 18, 1946 was entered. Klein explained his lack of [7307] knowledge in the item by the long period that had expired since its occurrence and stated that he may because of pressure of other matters have neglected to give Rokoff specific instructions as to its nature, after giving the check.

Klein could not recall having told Haas that the $35,000 was for services rendered but he knew Haas had not in the period Klein knew him rendered services worth that amount.

Klein stated that with the discontinuance of the operations of the foreign companies in the sale of Harwood's and in accordance with his previous understanding with his associates, bonuses were to be paid to Roer, Koerner and Alprin. Koerner and Alprin each requested that his be paid to La Economica Agencias, a company of which Klein knew Alprin to be the principal. Klein agreed to make the bonuses payable to any nominee. Klein knew La Economica Agencias existed because he had heard talk that the Harwood success had prompted the others to set up companies to go into the export market in Cuba.

Tivoli purchased two bank drafts each for $264,-162.70 on March 27 1947, each payable to La Economica Agencias and one for $272,423.62 payable [7308] to Compania Exportadora Fernandina (Government's 340).

On page 14 of the Tivoli book under date of March 27, 1947 entries disclose payments to La Economica Agencias for $528,325.40 and one to Compania Exportadora Fernandina for $272,423.62 charged to Accrued Commissions and Expenses.

The payments were not for services, they were bonuses—pretty nearly a gift.

Klein did not recall conferences in Baltimore attended by Haas, Alprin, Rosenberg and Klein in the spring or early summer of 1946 and he denied having, shortly prior to July 1946, instructed Alprin, Koerner and Roer to each form three or four Cuban corporations.

Summary of Testimony Remaining in the Record

Klein may have told Alprin that the $264,162.70 payment to him was a bonus. It was not a bonus for services rendered because Alprin did not render services worth that kind of money. When Klein gave Alprin the cashier's check within a week or 10 days after its date—March 27, 1947—he may have placed a restriction upon it and could have suggested that because the OPA was subpoenaing bank documents, it not be used in a hurry, but he did not [7309] recollect having done so.

Klein did not recall later telling Alprin he could use the check.

Klein gave Alprin no instructions what to do with the draft and he did not instruct him to deposit it in a Canadian bank in early 1947.

Klein acknowledged having received a letter from Alprin in March 1952 confirming a telephone conversation in which Klein was stated to have given Alprin permission to use his check and to deliver Koerner's check to him.

Klein branded the statements in that letter as not in accordance with the facts which he claimed were that during an ordinary business trip to Montreal with Rosenberg he learned at the bank of an outstanding draft which if not shortly presented would have to be honored at the Bank of Canada on identification and therefore when he and Rosenberg returned to New York he sent Rosenberg to tell Alprin these facts. When Klein received Alprin's letter of March 1952 he turned it over to his lawyer McGuigan who replied to it.

Summary of Testimony Remaining in the Record

On December 10, 1952 Hyman H. Klein was again interrogated under oath, in connection with [7310] his income tax liability at the Intelligence Division of the Internal Revenue Bureau by Special Agents Victory and McCarthy. Mr. Green and Klein's lawyers McGuigan and Kilcullen were present.

Klein stated that one of the $264,162.70 drafts purchased for La Economica Agencias was for Koerner. It was made payable to La Economica Agencias, Alprin's company at Koerner's personal request.

Klein could not recall whether he personally delivered it or when or where it was delivered, but he believed both drafts were delivered to Alprin in March or April of 1947 within a week of their date —March 27, 1947.

Koerner's draft was similar in nature to Alprin's —a bonus for a job well done in promoting Harwood's. Klein had no recollection of placing a restriction on the use of Koerner's draft although he may have. Klein did not know why Alprin did not release Koerner's draft until March 1952.

In 1949, 1950 and 1951 Koerner asked Klein for a new draft because Alprin wouldn't endorse his, but Klein told him the company was out of business [7311] and there was no way he could do it. Klein vaguely remembered Koerner having explained Alprin's reluctance to endorse his draft as attributable to Alprin's fear of tax liability because the draft was made payable to Alprin's company.

Klein had no recollection of Koerner having attributed Alprin's refusal to endorse the draft to Klein's instructions.

The $272,423.62 draft was made out to Compania Exportadora Fernandina at Roer's request. Klein learned of the existence of the company from Roer who formed it with the idea of doing business in Central and South America.

The payment was a bonus to Roer, similar to the other two checks, for a job well done although Roer claimed otherwise and Klein had a lawsuit with him.

Klein had no recollection of placing any restriction on Roer's draft although he may have. He gave Roer no instructions what to do with the draft.

I have this in parentheses:

(Klein's statement then consists of a [7312] resume of his previous testimony about the three bank drafts of March 27, 1947 and continues, in substance:)

In the fall of 1951 Klein, Rosenberg and Roer were walking on Fifth Avenue when Roer at the suggestion of his tax man asked Klein for a letter that the payment by Tivoli was a liquidating or partial liquidating dividend so that it could be reported as a capital gain. Klein refused to give such a letter because it was not the fact, inasmuch as neither Roer, Alprin nor Koerner were stockholders of Tivoli.

Klein specifically remembered this incident with Roer because he had learned when later in Canada with Rosenberg that Roer's check had cleared the bank in the spring of 1950.

Let me re-read that:

Klein specifically remembered this incident with Roer because he had learned, when later in Canada with Rosenberg, that Roer's check had cleared the bank in the spring of 1950.

On page 171 of the Tivoli book there was an account entitled "Accrued Commissions and Expenses Payable" reflecting liabilities of $1,309,-126.17. [7313] In February and March 1947 payments were made against the account totalling $890,-749.02 reducing the liability to $418,377.15. Klein could not state to whom this $418,377.15 balance belonged because the account was one that everything was thrown into. Unsettled reserves may have been set up and Roer's lawsuit still had to be resolved.

Tivoli got its funds to meet the accrued commissions and expenses from the operating companies but Klein stated that it was not necessarily merely a depositary to pay commissions and expenses in the Harwood deal.

On or about February 11, 1947 Tivoli bought $1,500,000 United States certificates of indebtedness which Rosenberg picked up.

Klein, when he contemplated disposing of his interests in the Panamanian and Cuban corporations, determined their value by the net worth shown on the consolidated balance sheet and discussed it with I. J. Klein, Norgan and McLennan, who knew in advance that Klein was taking $4,700,000 in cash out of the foreign companies on January 20, 1947.

Summary of Testimony Remaining in the Record

[7314] Klein did not remember the source of the final figures although he knew that Rokoff prepared trial balances from his memorandum records.

While Rokoff's trial balances could have been turned over to Haas, Klein did not recall that they were. Tivoli was not included in the consolidated balance sheet because Klein bought it because it took much less to gain control of that company.

That Haas, Schlesinger and Mayer's report showed a Regan Potter accounts receivable asset of $1,500,000 not shown on Rokoff's Regan Potter trial balance was explained by either Klein or Rokoff having told Haas of a loan by Regan Potter.

Regan Potter's assets were shown as $5,412,-531.62 of which Klein's one-quarter ownership represented $1,353,132.90. Klein's 1947 return (Government's 356) reflected a capital gain on this company of $978,132.90 or exactly $375,000 less. Klein based this difference on his purchase of the Tivoli stock from the other three stockholders.

Klein attributed the advice to thus report the Regan Potter capital gain to Haas, who [7315] made up the return. Klein had no idea who typed on his 1947 return "And in accordance with advice and instructions from counsel" and he didn't know why it was done nor had he seen it before the interrogation. In addition to Haas, McGuigan and Kilcullen and Root, Ballantine were consulted about Klein's 1947 return.

Klein gave Haas all his available papers to prepare the 1947 return and Haas prepared trial balances and consolidated balance sheets.

Summary of Testimony Remaining in the Record

The rider attached to Klein's 1947 return referring to Tivoli and Hannes was attached on advice of counsel—namely Haas, McGuigan and Kilcullen and Root-Ballantine.

Hannes & Company was organized February 25, 1947, in Panama. H. H. Klein owned the stock but could not recall the officers and directors. It never did any business. Its contingent liabilities were those inherited from Tivoli which Hannes took over. None were U. S. taxes because Klein denied owing any U. S. taxes.

Tivoli borrowed $1,500,000 from Regan Potter in December 1946 to buy a distillery in Scotland but the deal fell through and the funds [7316] were returned to Regan Potter.

And that concludes the summary of the portion of the Klein statement not stricken.

Now that you have heard the summary of all of this testimony and of these statements it may have occurred to you as it occurred to me that there are conflicts, and of course the answer to that is that all I did was not substitute what I thought should have been the testimony but as objectively as possible reflected in a summary what the testimony was. Whatever conflicts, if any, appeared between the versions by one and the other either upon the stand or in the statements are those things that will or may enter into your deliberations at the appropriate time.

Now we will take a recess for fifteen minutes.

(The jury left the courtroom and the following occurred in their absence.)

* * *

No. 593

NOV 1 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

—against—

HYMAN HARVEY KLEIN, MAURICE HAAS, and MORRIS O. ALPRIN,
Defendants-Appellants.

and

ISIDOR J. KLEIN, ALBERT McLENNAN, GEORGE NORGAN, ELLIS ROSENBERG, IRVING A. KOERNER and ALBERT ROER,
Defendants.

APPENDIX TO APPELLANTS' BRIEFS

Volume III
(Pages 1365-2014)

UNITED STATES COURT OF APPEALS
FILED
MAR 7 1957
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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Defendant Alprin's Supplemental Requests to Charge (I)	2407-2423
Colloquy	2424-2431